Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS E. HOAR, INC.,

Petitioner,

vs.

SARA LEE CORPORATION and
SARA LEE KNITWEAR, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a party to an agreement breach its implied covenant of good faith when it assigns, pretextually, a contractual ground for terminating the agreement, where the real reason for termination is different?

May a court ignore evidence of the prior course of dealing between parties to an agreement in determining whether a party has waived a provision of the agreement?

Once a party to an agreement commences on action claiming breach of the agreement by another party, is the party claiming breach within its right to withhold payment under the agreement?

Are the motives of a party to an agreement relevant in determining whether that party wrongfully terminated the agreement where, but for that party's own actions, it would not have sustained injury under the agreement?

Must a pleading specify the legal theory upon which it is based or is it sufficient for a pleading to specify facts demonstrating liability?

Should leave to amend a pleading be granted where the other parties have had knowledge of the allegations forming the basis of the proposed amendments for several years, and leave is sought in response to a motion to dismiss for failure to plead with specificity which was made two years after the movant had knowledge of the proposed amendments?

Does the burden to prove damages or lack thereof shift to the defendant if the damages are not solely within the defendant's knowledge and the defendant is in no position to prove lack of damages because of the entry of a preclusion order?

STATEMENT PURSUANT TO RULE 29.6

Petitioner has no parent company or nonwholly owned subsidiary.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
A. Factual Background	2
B. Proceedings In the District Court	4
C. Proceedings In the Second Circuit	7
Reasons for Granting the Writ	11
The Wrongful Termination Claims	12
I. The Petition Should Be Granted Because The Opinion Below Conflicts With The Decision Of Another Court Of Appeals On The Fundamental Contractual Principal Of Implied Covenant Of Good Faith	12

Contents

Page

II. The Petition Should Be Granted Because The Opinion Below Ignored Evidence Of Waiver In Conflict With Controlling Law 13

III. The Petition Should Be Granted Because The Opinion Below Ignored Applicable Statutory Law 14

IV. The Petition Should Be Granted Because The Opinion Below Conflicts With Controlling Law With Respect To Hanes' Motives 15

The Robbins Conversion Claim 16

V. The Petition Should Be Granted Because The Opinion Below Departed From The Usual And Accepted Course Of Proceeding With Respect To Pleadings 16

Hanes' Counterclaim 18

VI. The Petition Should Be Granted Because The Opinion Below Is Contrary To This Court's And Its Own Prior Decisions Respecting Damages 18

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Albert v. Caravano, 851 F.2d 561 (2d Cir. 1988) 17

Cranston Print Works Co., v Public Service Co., 291 F.2d 638 (4th Cir. 1961) 16

Filmline Productions, Inc. v. United Artists Corp., 622 F. Supp. 798 (S.D.N.Y. 1987), *aff'd*, 865 F.2d 513 (2d Cir. 1989) 19

Flickinger v. Harold C. Brown & Co., 947 F.2d 595 (2d Cir. 1991) 17

Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997) 16

In re Globe Distributors, Inc. v. Adolph Coors Co., 129 B.R. 304 (D.N.H. 1991) 12

L&H Investments, Ltd. v. Belvey Corp., 444 F. Supp. 1321 (W.D.N.C. 1978) 16

Malverne Distributors, Inc. v. Profile Records, Inc., 135 A.D. 2d 478, 522 N.Y.S. 2d 569 (1st Dep't. 1987) .. 15

Newman v. Silver, 713 F.2d 14 (2d Cir. 1983) 17

Philson v. Cold Creek Farms, Inc., 947 F. Supp. 197 (E.D.N.C. 1996) 12

Cited Authorities

Page

Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) 17

Sheldon v. Munford, Inc., 950 F.2d 403 (7th Cir. 1991) 12, 13

United States v. New York, New Haven & Hartford R.R., 355 U.S. 253 (1957) 19

Wheeler v. Wheeler, 299 N.C. 633, 263 S.E. 2d 763 (1980) 13

Statutes:

28 U.S.C. § 1254(1) 1

Section 2-717 of the Uniform Commercial Code, codified in North Carolina as N.C. Gen. Stat. Section 25.2-717 (1996) 1, 8, 15

APPENDIX

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed September 14, 1998 ..... 1a

Appendix B — Memorandum And Order Of Judgment Of The United States District Court For The Eastern District Of New York Dated And Filed July 29, 1997 ..... 6a

Appendix C — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated May 8, 1996 ..... 35a

Appendix D — Order And Judgment Dated May 13, 1992 And Partial Judgment Dated March 31, 1992 Of The United States District Court For The Eastern District Of New York 60a

Appendix E — Opinion Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed October 20, 1998 ..... 64a

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinions of the United States District Court appear at Appendices B, C and D to the petition and are unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided this case was September 14, 1998.

A timely petition for rehearing was denied by the United States Court of Appeals on October 20, 1998, and a copy of the order denying rehearing appears at Appendix E to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UCC Section 2-717, codified by N.C. Gen. Stat. Section 25.2-717 (1996), states:

> The buyer on notifying the seller of his intention to do so may deduct all or part of the damages resulting from any breach of contract from any part of the price still due under the same contract.

STATEMENT OF THE CASE

The fundamental question in this case is whether a party to an agreement breaches its implied covenant of good faith when it assigns, pretextually, a contractual ground for terminating the agreement, where the real reason for termination is different. Various ancillary

questions also exist in this case emanating from the termination of an agreement between the parties herein. To fully understand the significance of the many issues presented by this case, it is important to consider its factual and procedural background.

A. Factual Background

Petitioner Thomas E. Hoar, Inc. ("Petitioner" or "Hoar") was in the clothing distribution business. 90% of Hoar's $3 million annual sales volume derived from the distribution of Hanes men's and boy's underwear. The Hanes products are manufactured by Respondents ("Respondents" or "Hanes"). Prior to the mid-1980's, the bulk of Hanes' distribution was through independent distributors such as Hoar. Beginning in 1984 through 1995, Hanes drastically reduced the volume of its products sold through independent distributors from 50% to 5%.

On October 26, 1983, Hanes and Hoar entered into their most recent five-year Franchise Agreement (the "Agreement") through which the parties did business until Hanes purported to terminate Hoar's distributorship, effective August 12, 1986. Prior to the Agreement, the parties had done business under similar agreements which were routinely renewed by Hanes. Under the Agreement, termination prior to its expiration was only available for cause. The Agreement is governed by North Carolina law.

During the course of the parties' contractual relationship, Hanes regularly conducted promotions whereby distributors purchased merchandise at discounts (the "Promotional Allowances"), which were to be passed-through by the distributors to their customers. With Hanes' knowledge and acquiescence, Hoar sometimes passed through Promotional Allowances by giving equivalent discounts on items not included in the promotion or by averaging the discount over the course of a year.

Hanes initially tracked the pass-throughs by requiring distributors to file claim forms itemizing the pass-throughs, accompanied by invoices evidencing same. From 1984 through the spring of 1986, distributors were required to file affidavits itemizing the pass-throughs,

without invoices. To the extent pass-throughs were not itemized on either the claim forms or affidavits, the distributors would be charged for the Promotional Allowances. This often created a problem for distributors because, due to Hanes' delay in shipping merchandise, the merchandise would often not be received, and the pass-through therefore not made, by the time the claim forms had to be submitted. To resolve those problems, many distributors, including Hoar, would submit claim forms showing pass-throughs that had not yet, but would, be made. Hanes had knowledge of and acquiesced to this practice since they had their own means of verifying the pass-throughs. Hanes also knew that Hoar passed-through all or substantially all of the Promotional Allowances to its costumers.

In 1984, Hanes began its attempts at converting retailers to direct customers, thereby eliminating distributors including Hoar, who was one of the largest distributors in the Northeast. Unable to convert Hoar's customers to direct purchasers, Hanes determined to force the termination of the Agreement. Since Hoar was one of Hanes most outspoken distributors, termination of the Agreement would benefit Hanes and its control of the other distributors.

In mid-1985, Hanes embarked on a documented course of conduct designed to harass Hoar, and aggressively sought to convert Hoar's accounts. By virtue of a short-shipping dispute, Hanes stopped shipments of merchandise to Hoar; in order to resume its receipt of merchandise, Hoar paid the disputed amount to Hanes under protest. The next day Hanes announced an unprecedented "audit" of Hoar's Promotional Allowance claims. Such an audit had never before and never since been made with any other distributor. Given Hanes' knowledge of and acquiescence to the distributors' methods of passing through Promotional Allowances, the "audit" of Hoar could only have been a pretext for its attempt to terminate the Agreement.

Based on what Hoar believed was Hanes' bad-faith conduct, in May 1986 Hoar commenced an action in the United States District Court for the Eastern District of New York (the "District Court") alleging seven causes of action, five of which were dismissed and not subject to any appeal. The remaining two causes of action sought damages for Hanes' wrongful termination of the Agreement, and for Hanes' wrongful conversion of one of Hoar's customers.

Shortly after the commencement of the action, and on the advice of its prior counsel, Hoar delayed its payment of certain merchandise received from Hanes. At that time, the subject invoice was less than 13 days overdue. Up to that time, Hanes had never terminated a distributor agreement for non-payment and distributors who had invoices as much as 30 days past due were not terminated. Despite this, Hanes immediately terminated the Agreement based on Hoar's 13 day past due invoice. Hanes gave no notice to Hoar that it was changing its long-standing practice with respect to late payments, nor did it offer any cure period to Hoar.

Subsequent to providing Hoar with a notice of termination, Hanes for the first time provided notice to its other distributors that its payment policy would be strictly enforced *prospectively*. Hanes provided no such notice to Hoar.

B. Proceedings In the District Court

Hanes answered the complaint filed by Hoar, and asserted three counterclaims against Hoar. First, Hanes sought $500,000 for goods purchased by Hoar, which was subsequently paid by Hoar. Second, Hanes sought recovery of Promotional Allowances allegedly not passed-through to Hoar's customers. Third, Hanes alleged other violations of the Agreement, which it subsequently withdrew.

Extensive discovery was conducted in the action, which produced one particularly applicable dispute as follows. During discovery, Hanes focused its demands on Hoar's records pertaining to the Promotional Allowance pass-throughs. Hanes alleged that Hoar's responses to those requests were deficient and moved for an order of preclusion with respect to that evidence.

Specifically, Hanes alleged deficiencies in responding to an interrogatory through which Hanes sought: (i) information concerning Hoar's pass-throughs of certain 1984-1986 Promotional Allowances totaling $364,883 and "reflected in affidavits annexed to Hanes' counterclaim"; and (ii) identification of orders and invoices documenting the pass-throughs. Thus, Hanes sought an order precluding Hoar from introducing evidence with respect to the 1984-

1986 pass-throughs described in the affidavits "attached to the counterclaim" only, which was conditionally granted by the magistrate judge in November, 1988 and affirmed by the District Court in January 1989.

Hoar then supplemented its interrogatory answers, which Hanes also considered inadequate, and Hanes moved for imposition of the evidentiary sanction it believed was prescribed by the magistrate judge in the November 1988 Order, described by Hanes as precluding Hoar from offering the evidence sought by the interrogatory (*i.e.*, evidence that Hoar has passed-through the 1984-86 allowances). In a March 16, 1989 report and recommendation, the magistrate judge recommended imposing the sanctions set forth in the November 1988 Order, including preclusion, allegedly for the reasons set forth in Hanes' Memorandum. By its memorandum and Order dated August 29, 1989 (the "Preclusion Order"), the District Court adopted the magistrate judge's findings and awarded the recommended relief.

As a result of the Preclusion Order, Hanes moved for summary judgment on its counterclaim. Although the counterclaim sought damages only for the amount of the Promotional Allowances allegedly wrongfully appropriated by Hoar, Hanes' summary judgment motion sought an award of virtually all Promotional Allowances received by Hoar between 1980 and 1986, approximating $788,865.

Hanes made no effort to demonstrate that Hoar had wrongfully appropriated the entire amount of the pass-through Allowances and to the contrary admitted that Hoar did pass through some of the Allowances and that it was impossible for Hoar not to have passed on at least some Allowances.

Hanes also made no effort to demonstrate its actual damages (*i.e.*, the amount of Promotional Allowances received but not passed-through by Hoar). Instead, Hanes argued that summary judgment was automatically appropriate in the entire amount because the Preclusion Order prevented Hoar from proving any pass-throughs, including the 1980-1983 Allowances that were not subject to the Preclusion Order.

Over Hoar's objection, the District Court held no hearing on the amount of money Hanes should have received in connection with its

counterclaim, and simply granted summary judgment for the entire amount sought in Hanes' summary judgment motion, plus interest. Hanes then drafted an Order and Judgment which stated that the District Court ruled that the Preclusion Order precluded Hoar from introducing any evidence of compliance with the pass-through requirement and that Hanes was entitled as a matter of law to recover the undisputed amount of Allowances given to Hoar and not returned.

The District Court signed Hanes' order, and the counterclaim judgment was entered on or about March 31, 1992 in the amount of $788,864.50. Pre-judgment interest in the amount of $566,510.01 increased the judgment to a total of $1,355,374.51. With post-judgment interest, the judgment far exceeds $2 million. Hoar appealed the counterclaim judgment to the United States Court of Appeals for the Second Circuit (the "Second Circuit").

In July, 1992, Hoar retained new counsel, who attempted to vacate the counterclaim judgment based on the affidavits of two former Hanes employees, which were previously unavailable. The affidavits stated that Hanes had targeted Hoar for elimination, the Hanes Promotional Allowance program was never enforced in the manner being applied to Hoar, and the audit demand in April 1986 was an unprecedented set-up of Hoar. Two other attempts to vacate the judgment were made by Hoar, and denied, in 1993 and 1996.

In 1995, Hanes sought to depose the two witnesses who had come forward to help Hoar. The District Court reopened discovery, which had been closed since 1988, and entered an order permitting each side to conduct 12 depositions, which took place in the summer of 1995. Those depositions developed important new evidence of Hanes' actions and intent.

Following the completion of the additional discovery, Hanes moved in November 1995 for partial summary judgment seeking an order that its termination of the Agreement was valid and effective and did not give rise to liability under any of Hoar's legal theories. Hanes conceded for purposes of the motion that prior to Hoar's breach of its payment obligation, Hanes personnel intended to contrive another ground for termination, with the motives ascribed by Hoar.

The motives that Hanes conceded were its desire to obtain the business of Hoar's major customers as direct customers of Hanes, its intent to make an example of Hoar to the other distributors, and its animus towards Hoar.

Hanes did not discuss, and the magistrate judge did not consider, the bad faith actions that it had taken towards Hoar in the year preceding the termination. The magistrate judge granted Hanes' motion in an opinion dated May 8, 1996, which dismissed all of Hoar's claims except for its claim against Hanes concerning the conversion of the account of one of its customers. Hoar also appealed that decision and order to the Second Circuit.

Lastly, in March 1997, Hanes moved to dismiss Hoar's claim concerning Hanes' conversion, in late 1985, of Hoar's account with Robbins Men's and Boys' Wear ("Robbins"), a $1 million per year account of Hoar's. In 1995, Hoar had discovered that a principal reason for Robbins' switch to Hanes was that Hanes had told Robbins, falsely, that Hoar had a bad credit record. This issue was the subject of many of the 23 depositions the parties took in 1995, and also of a two-day deposition of Mr. Robbins that Hanes conducted in 1997. When the summary judgment motion was made, this claim was ready for trial. In an opinion dated July 29, 1997, the District Court granted Hanes' motion and dismissed Hoar's remaining claims on pleadings grounds. Hoar also appealed that order to the Second Circuit.

C. Proceedings In the Second Circuit

On appeal to the Second Circuit, Hoar advanced arguments with respect to three issues. First, Hoar asserted that as a matter of law the District Court improperly found that Hanes' pretextual reason for termination (*i.e.*, non-payment) was enough to satisfy Hanes' implied covenant of good faith in connection with the Agreement. This finding was made even although Hanes conceded that it intended to contrive another ground for termination with the motive to eliminate Hoar and convert Hoar's customers to its own. Although the District Court cited to various federal and state cases in support of its holding, Hoar submitted to the Second Circuit several circuit court cases as well as cases determined under applicable North Carolina law, which specifically held the opposite of the District Court.

Hoar further argued to the Second Circuit that Hanes waived its right to termination for untimely payments, submitting in support of its position black letter North Carolina law, as well as Seventh Circuit law, which states that a party may waive its right to a contractual provision by continuing to accept performance after the other party's breach, and that a franchisee is entitled to judgment on proof that by its past conduct, the franchisor all waived its right to termination for non-payment. Hoar claimed that the district court, in finding that Hanes had not waived its right to terminate for non-payment, ignored evidence of other customers' lateness and Hanes' other waivers, and ignored that Hanes admittedly provided no notice to Hoar of its intention to hold its distributors to the strict terms of the Agreements prospectively.

Although not raised in the District Court, Hoar also asserted to the Second Circuit that its late payment was excused by Section 2-717 of the Uniform Commercial Code and that, under that section, once it filed its action against Hanes claiming that Hanes breached the Agreement, Hoar was within its rights in withholding payment; since Hoar was within its rights under the Uniform Commercial Code in withholding payment, its withholding of same could not have constituted a breach of the Agreement and Hanes' subsequent termination of the Agreement was therefore unlawful.

Lastly with respect to its claims for wrongful termination, Hoar argued that the District Court ignored North Carolina and Fourth Circuit law in erroneously failing to consider the causal relationship between Hanes' actions against Hoar and Hoar's withholding of payments resulting in its finding that Hoar's allegations of Hanes' improper motive was irrelevant if other good cause existed to terminate the agreement. In this regard, Hoar cited to law which recognizes liability where "but for" a party's act, the injury would not have occurred.

The Second Circuit affirmed the order of the District Court with respect to Hoar's claim for wrongful termination. In its decision, the Second Circuit merely found that it was undisputed that Hanes had a contractual right to terminate for cause, that Hoar was obligated to make timely payments for merchandise, and that Hoar's failure to

make timely payments constituted cause for Hanes' termination. The Second Circuit further agreed with the District Court that Hoar's non-payment furnished Hanes with a good faith reason to terminate the Agreement and that Hoar's allegations of improper motive were irrelevant to a determination of a good faith performance.

The Second Circuit also found, like the District Court, that the Agreement had a "no waiver" clause and that it could not be modified except by writing, and that by virtue of the foregoing, Hoar's waiver claim must fail as to the other grounds raised by Hoar.

In addition to pursuing its claim for wrongful termination, Hoar also argued to the Second Circuit that the District Court should not have granted summary judgment in favor of Hanes on Hoar's claim that Hanes improperly converted the Robbins account to its own. In this regard, Hoar asserted that the District Court failed to file established federal rules and law in ignoring extensive evidence that Hanes' disparaged and defamed Hoar to convert one of Hoar's largest accounts. Instead, the District Court denied Hoar's claims with respect to the conversion of the Robbins account based on Hoar's failure to specify in its complaint the legal theory upon which its action was based and its failure to specify the false statements made by Hanes to Robbins. Hoar argued that such a holding was contrary to the Second Circuit's own prior rulings which held that a party does not have to specify the legal theory on which its complaint is based but must rather set out facts to demonstrate liability under that theory. Hoar also argued that it indeed pled sufficient facts to demonstrate Hanes' liability on this cause of action, including that Hanes knew about Hoar's claim for conversion of the Robbins account for 9 years and took part in extensive discovery with respect to such conversion; that Hanes was told in 1995 about Hoar's conversations with Robbins which revealed that Hanes made disparaging and defamatory remarks about Hoar to Robbins; that there were 22 depositions conducted in 1995 in which the false statements made to Robbins arose; and that Hanes itself conducted a three day deposition in early 1997 of Robbins regarding the false statements. Despite having extensive knowledge about Hoar's cause of action for conversion of the Robbins account, when that cause of action was ready for trial and after extensive discovery, Hanes for the first time moved to dismiss the cause of

action for failure to plead with specificity. Hoar argued to the Second Circuit that the foregoing facts demonstrated liability on Hanes' part and that given the sufficiency of facts demonstrating liability and the applicable Second Circuit law, Hoar was not required to specify the legal theory under which it was proceeding.

Hoar also asserted that the District Court wrongfully denied Hoar's motion for leave to amend its complaint based on the foregoing facts and the fact that Hoar did not learn of the false statements until 1995, almost nine years after the action was commenced.

The Second Circuit similarly affirmed the District Court's order with respect to the conversion claim, merely stating that it was within the discretion of the District Court to deny Hoar's motion for leave to amend because its request was made 11 years after the action was commenced. The Second Circuit neither discussed nor explained why the law of the Second Circuit should not have been followed by the District Court in connection with that cause of action.

Lastly, Hoar argued to the Second Circuit that the District Court incorrectly granted summary judgement to Hanes upon its counterclaim. First, Hoar alleged that the Preclusion Order was entered improperly in the first instance since the District Court never found Hoar responsible for any of the infractions which led to the Preclusion Order, that there was evidence of subsequent attempts by Hoar to comply with discovery despite its prior counsel's inadequacies in that regard, and that by virtue of the foregoing, the Preclusion Order was a violation of Hoar's rights to do process.

Hoar further asserted that even despite the improprieties it believed surrounded the entry of the Preclusion Order, Hanes never proved the damages that it was entitled to in connection with its counterclaim and that therefore the judgment was improper. In this regard, the counterclaim sought monetary damages for all Promotional Allowances wrongfully appropriated by Hoar. Hanes had the burden of showing damages that it was entitled to. However, the District Court did not require Hanes to prove damages and in doing so, shifted the burden on the counterclaim to Hoar. This result was contrary to opinions of this Court and others which hold that the burden of proof

should only shift if the fact to be proved is "peculiarly" or "solely" within the other parties knowledge. Hoar argued that it demonstrated before the District Court that the damages to be proven were not solely within Hoar's knowledge since Hanes collected its own data and received extensive discovery on the issue of pass-throughs, and that Hoar was not in a better position to prove damages because of the Preclusion Order which prohibited Hoar from interposing any evidence with respect to damages. Given this, Hoar contended that the District Court improperly shifted the burden of proving damages with respect to the counterclaim to Hoar.

Finally, Hoar asserted that the District Court misapplied the Preclusion Order in entering a judgment in the base amount of $788,865. The Preclusion Order only applied to Promotional Allowances referred to in the affidavits attached the counterclaim, which constituted the 1984 through 1986 Promotional Allowances totaling $364,883. However, the District Court entered summary judgment in the amount of all Promotional Allowances from 1980 through 1986 allegedly based on the Preclusion Order.

The Second Circuit also affirmed the District Court's order regarding the counterclaim. The only basis for its affirmance was that the District Court "acted within its discretion in precluding the evidence.

REASONS FOR GRANTING THE WRIT

The legal reasons why Hoar believes that the petition should be granted are discussed below. It is extremely important for this Court to note, however, that the issues presented in this petition are crucial in that they represent the ever-increasing imbalance that exists between multi-billion dollar economically superior entities and their much smaller contractual partners. This case epitomizes the reality that multi-billion dollar companies who contract with small business can run rampant in their actions to the detriment of the majority of American entities simply because they have the financial resources to do so. In the end, if decisions such as the one here are permitted to stand, such contracts are meaningless to the small business because the country's large corporations can simply get away with whatever they want.

THE WRONGFUL TERMINATION CLAIMS

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE FUNDAMENTAL CONTRACTUAL PRINCIPAL OF IMPLIED COVENANT OF GOOD FAITH

Hoar's petition for writ of certiorari should be granted because the opinion below conflicts with the decision of another Court of Appeals on the fundamental principal of the implied covenants of good faith inherent in contractual relationships. The Second Circuit determined that Hoar's delayed payment to Hanes furnished a good faith basis for Hanes' termination of the Agreement and that Hanes' improper motives in terminating the Agreement were irrelevant to a determination of whether Hanes wrongfully terminated same. This decision conflicts with the decision of another Court of Appeals, as well as North Carolina law.

In *Sheldon v. Munford, Inc.*, 950 F.2d 403 (7th Cir. 1991), the Seventh Circuit held that a franchisor "cannot assign, pretextually, a contractual ground for termination, where the real reason is something different." *Id.*; *see, e.g.*, *In re Globe Distributors, Inc. v. Adolph Coors Co.*, 129 B.R. 304 (D.N.H. 1991) (awarding franchisee $10 million in damages for franchisors' bad faith termination of franchise on pretextual grounds of non-payment and insolvency, where franchisor's real concern was different). Similarly, in *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), the North Carolina district court ruled that a party must exercise "good faith in its termination" of an agreement, even where that agreement provides for termination without cause.

The Second Circuit completely disregarded the above controlling law. If the Second Circuit had applied the law consistent with the Seventh Circuit and the North Carolina district court, it could only have concluded that Hanes' admitted termination of the Agreement

for reasons other than non-payment and Hanes' admitted motives in terminating the Agreement constituted wrongful termination.

In departing from the above controlling law, the Second Circuit effectively upended the fundamental contractual premise of the implied covenant of good faith. Moreover, the Second Circuit did so without explanation. In affirming the District Court's decision, and with the knowledge of the controlling law, the Second Circuit merely agreed that non-payment furnished Hanes with a good faith reason to terminate the Agreement regardless of Hanes' motives. The Second Circuit made no attempt to explain why it was not applying the correct, controlling law.

Thus, not only did the Second Circuit's decision wholly conflict with the decision of another circuit court and the law of the controlling jurisdiction, it did so at the expense of the fundamental premise of judicial precedence. For these reasons, this Court should grant Hoar's petition for certiorari with respect to this issue.[1]

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IGNORED EVIDENCE OF WAIVER IN CONFLICT WITH CONTROLLING LAW

Hoar's petition should also be granted because the Second Circuit ignored evidence of Hanes' waiver of late payments in conflict with the law of the Seventh Circuit, and controlling North Carolina law. North Carolina law provides that a party may waive its right to a contractual provision by continuing to accept performance after the other party's breach of that provision. *See Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980). The Seventh Circuit has found that this principal extends to a manufacturer's waiver through its custom of accepting late payment, to its right to timely payments from its franchisees. *See Sheldon v. Munford, Inc.*, 950 F.2d 403 (7th Cir. 1991).

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1. At a minimum, if the Second Circuit agreed with the legal analysis of the District Court, which applied laws of other circuit courts which differs from North Carolina and the Seventh Circuit, a split exists amongst the circuits on this issue, necessitating review by this Court.

The Second Circuit, again, failed to apply the foregoing law and, in doing so, entered a decision in conflict with same. On appeal to the Second Circuit, Hoar argued that the District Court ignored evidence of Hanes' waiver, including evidence of other distributors' lateness in payment and Hanes' repeated waiver of same, and that Hoar had no notice that Hanes would depart from its usual and customary practice by requiring strict performance prospectively, although all of Hanes' other distributors were provided with such notice.

The District Court, in ignoring this evidence and simply ruling that no waiver had occurred, departed from the accepted and usual course of judicial proceedings of considering evidence in determining an issue. The Second Circuit, in similarly ignoring the evidence, sanctioned the District Court's inappropriate departure and itself departed from accepted and usual judicial standards.

Had the admitted evidence been properly considered, the District Court and Second Circuit would had to have determined that Hanes continually and customarily accepted performance by its distributors after they tendered late payments. Applying those findings to the controlling law, the courts below would also had to have determined that Hanes waived timely payment from Hoar. In failing to do so, the Second Circuit entered a decision in conflict with controlling law, necessitating that Hoar's petition be granted on this matter as well.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IGNORED APPLICABLE STATUTORY LAW

The Second Circuit, in summarily determining that Hanes did not wrongfully terminate the Agreement, also ignored applicable statutory law, the Uniform Commercial Code, and without discussion of same simply found that Hoar's contentions thereunder were "without merit".

Section 2-717 of the Uniform Commercial Code, codified in North Carolina as N.C. Gen. Stat. Section 25.2-717 (1996), states:

> The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of contract from any part of the price still due under the same contract.

This section permits the buyer to deduct from the price damages resulting from any breach by the seller. UCC Section 2-717, Official Comment 2. The only requirement is notice, which can be provided by service of a complaint. *Malverne Distributors, Inc. v. Profile Records, Inc.*, 135 A.D. 2d 478, 522 N.Y.S. 2d 569 (1st Dep't. 1987). The Second Circuit's opinion was contrary to this federal statute.

The Second Circuit, affirming the District Court, found that Hoar's late payment constituted a breach of the Agreement and that Hanes's termination was therefore proper. However, Hoar gave notice to Hanes, in the form of the District Court complaint, of its allegation that Hanes breached the Agreement and thereafter withheld the subject payment. In accordance with the UCC, Hoar was within its rights in withholding the payment. Given this, the withheld payment could not have been a breach of the Agreement despite a contrary finding by the Second Circuit.

Thus, the Second Circuit's summary finding that Hoar's argument was "without merit", without explanation or discussion of the UCC, resulted in a decision contrary to federal statute. For this reason, Hoar's petition should be granted as to this aspect of the opinion as well.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH CONTROLLING LAW WITH RESPECT TO HANES' MOTIVES

The Second Circuit found that the District Court correctly found that Hanes' motives in terminating the Agreement were irrelevant in determining whether Hanes was liable for wrongful termination.

North Carolina, as well as the Fourth Circuit, recognizes liability where "but for" a party's act, injury would not have occurred. *Cranston Print Works Co., v Public Service Co.*, 291 F.2d 638 (4th Cir. 1961); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 959 (M.D.N.C. 1997); *L&H Investments, Ltd. v. Belvey Corp.*, 444 F. Supp. 1321 (W.D.N.C. 1978).

Application of the foregoing law must lead to the conclusion that Hanes wrongfully terminated the Agreement. Hanes' actions in harassing Hoar and its unprecedent audit, and Hanes' conceded motives of obtaining Hoars' major customers as direct customers of Hanes, its animus toward Hoar, and its intention to drive Hoar out as a distribution, all led to Hoar's claim for wrongful termination. Yet the District Court and the Second Circuit ignored those admitted motives in determining that there was no wrongful termination, claiming that the same were irrelevant.

Under applicable law, however, the motives of Hanes were anything but irrelevant since, but for Hanes' motives and actions, injury would not have occurred. This requires a finding of liability under the cases set forth above. The Second Circuit's failure to apply controlling law, therefore, resulted in a decision that is contrary to those in the Fourth Circuit and in North Carolina. Hoar submits that this, too, requires review by the Court.

THE ROBBINS CONVERSION CLAIM

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF PROCEEDING WITH RESPECT TO PLEADINGS

Hoar's petition should also be granted because the District Court and the Second Circuit so far departed from the usual and accepted course of judicial proceeding with respect to pleadings as to require the exercise of this Court's supervisory powers.

The District Court, sanctioned by the Second Circuit, summarily dismissed Hoar's claim that Hanes converted the Robbins account on the basis that the complaint in this regard did not specify the legal theories upon which it was based and failed to set forth Hoar's claim with specificity in that the false statements made by Hanes to Robbins regarding Hoar's credit were not specified in the complaint. This ruling was not only wholly inconsistent with law of the Second Circuit itself, but was also a departure from the Court's usual conduct when dealing with such issues.

First, Hoar's claim was dismissed by the District Court because it failed to specify the legal theory upon which it was based. In countenancing that decision, the Second Circuit issued an order that was contrary to its own prior rulings that it is not necessary to specifically cite to a legal theory in a pleading in order to pursue same. *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991); *Albert v. Caravano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988); *Newman v. Silver*, 713 F.2d 14, 15 n.1 (2d Cir. 1983); *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 196 (2d Cir. 1955). Hoar's claim, while not citing to the specific legal theory upon which it was based, alleged facts to support findings under those theories. Thus, dismissal of Hoar's conversion claim on this basis was contrary to the Second Circuit's prior rulings, necessitating review by this Court.

Moreover, dismissal of the conversion claim on the grounds that Hoar did not specifically set forth the false statements made by Hanes regarding Hoar's credit, and denial of Hoar's motion to replead, are equally reviewable. In dismissing on that basis, and in denying leave to replead, the District Court and Second Circuit departed from the usual course of proceedings in a manner that requires supervision by this Court.

Those decisions were made because, according to the lower courts, 11 years had elapsed since the complaint was filed and Hoar had basically taken too long to specifically plead the false statements. This is irrational given the admitted facts of the case and the District Court's prior position on the false statements. Hanes knew about Hoar's claims that Hanes wrongfully converted the Robbins account since the inception of the District Court action. The complaint did

not specify the false statements made by Hanes because Hoar had no knowledge of same until 1995, at which time it promptly announced its intention to pursue a claim for damages based on those statements under its existing complaint, without objection from either Hanes or the District Court.

The parties conducted 22 depositions between 1995 and 1997 which encompassed questioning on the false statements. The magistrate judge in the District Court, at a pre-trial conference held in December, 1996, promised Hoar a trial date on the Robbins conversion claim and confirmed that he would not hold Hoar to strict pleading requirements on this claim.

Despite the foregoing, it was Hanes who waited until the eve of trial two years after obtaining knowledge of Hoar's intention to pursue a claim based on the false statements to first move to dismiss for failure to specifically plead the false statements. Disregarding the facts surrounding the false statements and its own position that Hoar would not be held to strict pleading requirements regarding the same, the District Court dismissed this cause of action and denied Hoar leave to replead, which was affirmed by the Second Circuit.

Given the foregoing, Hoar submits that the Courts below require supervision on this issue, and that the within petition should be granted in this respect.

HANES' COUNTERCLAIM

VI.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IS CONTRARY TO THIS COURT'S AND ITS OWN PRIOR DECISIONS RESPECTING DAMAGES

The Second Circuit's decision as it pertains to Hanes' counterclaim should also be reviewed by this Court for several reasons. First, the District Court and Second Circuit ignored this Court's prior rulings with respect to the burden of proving damages and, in doing so, issued a decision contrary to United States Supreme Court law.

Hanes' counterclaim sought recovery from Hoar of any Promotional Allowances that were wrongfully appropriated by Hoar, which Hanes had the burden of proving. Indeed, Hanes had admitted that at least some of the Promotional Allowances were passed through and that it was impossible not to pass through at least some of them. Despite Hanes' burden of proof, the lower courts did not require Hanes to establish its damages, which therefore shifted the burden to Hoar to prove that Hanes was not damaged.

This shifting of the burden of proof to Hoar was contrary to the law espoused by this Court and by its own courts in prior decisions. According to the ordinary rule, based on considerations of fairness, a court may shift the burden to a litigate if the fact to proven is "peculiarly" or "solely" within its knowledge. *See United States v. New York, New Haven & Hartford R.R.*, 355 U.S. 253, 256 (1957); *Filmline Productions, Inc. v. United Artists Corp.*, 622 F. Supp. 798, 808 (S.D.N.Y. 1987), *aff'd*, 865 F.2d 513 (2d Cir. 1989).

The damages sought by Hanes were not peculiarly or solely in Hoar's knowledge, since Hanes collected its own data on Promotional Allowance pass-throughs and conducted extensive discovery on that issue. Not only was Hoar not a better position than Hanes to prove facts respecting the pass-throughs, but Hoar was in no position to do so by virtue of the Preclusion Order. Given this, the standards enunciated by this Court respecting the shifting of the burden of proof could not have been met, resulting in an opinion contrary to this Court's, and its own, prior decisions.

Moreover, the lower courts misapplied the Preclusion Order in such a prejudicial way that it requires review by this Court. The Preclusion Order only applied to Promotional Allowances referred to in the affidavits attached to Hanes' counterclaim, which encompassed the 1984-1986 Promotional Allowances totaling $364,883. However, the District Court, sanctioned by the Second Circuit, refused to permit Hoar to introduce evidence with respect to any pass-throughs from 1980 through 1986. Thus, the lower courts awarded judgment to Hanes on all Promotional Allowances, totaling $788,865, based on their misapplication of the Preclusion Order. This result, entry of a judgment contrary to the District Court's own prior

order in this case, similarly should be reviewed by this Court. Hoar therefore submits that its petition should be granted with respect to the counterclaim as well.

CONCLUSION

This case presents important issues regarding inherent contractual rights and the even more important issue of the rights of small corporations when contracting with multi-billion dollar companies. If the decision below is allowed to stand, Hoar is being stripped of its well-established rights through a decision that is completely contrary to the law of other circuits, its own circuit and even this Court. If the decision below is allowed to stand, large companies will continue to take unfair advantage of America's small businesses, effectively eliminating those companies. In granting petition for certiorari, this Court can not only reaffirm the role of judicial precedence and its importance in the judicial process but, can reaffirm the notions of fairness and opportunity which are supposed to be present in this country.

Accordingly, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED SEPTEMBER 14, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

97-9056

Thomas E. Hoar, Inc.,

Plaintiff-Appellant,

v.

Sara Lee Corp. and Sara Lee Knitwear, Inc.,

Defendants-Appellees.

* * *

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED**.

Appendix A

Plaintiff Thomas E. Hoar, Inc. ("Hoar") appeals from a final judgment of the United States District Court for the Eastern District of New York in favor of defendants Sara Lee Corp. and Sara Lee Knitwear, Inc. (collectively, "Sara Lee" or "defendant"). The case arose out of Hoar's long-time contractual relationship as a distributor of Sara Lee products. In April 1986, Sara Lee informed Hoar that it intended to conduct an "audit" of Hoar records relating to a program under which Sara Lee provided, through distributors like Hoar, "promotional allowances" to retailers. Hoar then initiated this action, alleging that defendant's promotional allowance program violated antitrust and other laws. In what it describes as a tactical legal maneuver, Hoar then withheld payment on over $500,000 in merchandise ordered and received from defendant. Sara Lee then informed Hoar that it was invoking its contractual right to terminate the contract based on Hoar's failure to pay for merchandise within 30 days. Hoar amended its complaint to allege wrongful termination of the contract, as well as other claims. Sara Lee counterclaimed.

Hoar contends the district court erred in granting summary judgment in Sara Lee's favor on Hoar's claim of improper termination of the contract. We disagree. It is undisputed that (i) Sara Lee had a contractual right to terminate "for cause"; (ii) Hoar was obliged to make timely payment for merchandise received from defendant; and (iii) failure to do so constituted "cause" for termination, Hoar contends that its nonpayment was not Sara Lee's true reason for terminating. It argues that because North Carolina law — which governs the interpretation of the contract — implies an obligation of good faith in every contract, *see Dull v. Mutual of Omaha Ins. Co.*, 354 S.E.2d 752, 756 (N.C. Ct. App. 1987), Sara Lee was precluded from terminating the contract purportedly on the basis of Hoar's nonpayment if

this reason was pretextual. In other words, Hoar argues, Sara Lee was justified in terminating the agreement "for cause" only if Hoar's breach was in fact its true reason for termination. We agree with the district court that Hoar's nonpayment furnished a good faith reason to terminate for cause and made any allegations of other improper motives irrelevant to a determination of good faith performance, *See* 3A Lawrence A. Cunningham & Arthur J. Jacobson, *Corbin on Contracts* § 654D (1998). Hoar also argues that its failure to pay in a timely fashion did not constitute a breach because defendant's course of performance with its distributors — from whom, Hoar alleges, defendant regularly excused late payments — amounted to a waiver of that requirement. This argument fails both because the contract contained an express no-waiver clause and because, under North Carolina law, a contract can be modified only by conduct reflecting the mutual consent of the parties to the modification, *see Electro Lift, Inc. v. Miller Equip. Co.*, 166 S.E.2d 454, 457 (N.C. Ct. App. 1969). As Hoar has not alleged any conduct indicating an intent to waive the requirement as to Hoar, summary judgment was appropriate.

Second, Hoar claimed that through false statements, defendant had converted one of Hoar's customers — Robbins MWB — into a direct customer of defendant ("the Robbins claim"). The magistrate judge granted defendant's motions for summary judgment by reason of Hoar's failure to plead Sara Lee's fraud with particularity and denied Hoar leave to replead. Hoar argues that these rulings were error. As an essential element of Hoar's claim, fraud must be pleaded with reasonable particularity. *See Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 763 (2d Cir. 1990). Although leave to replead is generally to be given freely, *see* Fed. R. Civ. P. 15(a), this decision is left to the sound discretion of the trial judge. *See*

Block v. First Blood Assoc., 988 F.2d 344, 350 (2d Cir. 1993). Given that Hoar's effort to amend came some eleven years after the filing of the complaint, we conclude the court acted within discretion when it denied leave.

Hoar also contests the district court's grant of summary judgment in favor of Sara Lee's counterclaim, seeking recovery of "promotional allowances" (discounts on merchandise featured in national sales promotions) that Hoar allegedly failed to "pass through" to retailers. In response to Hoar's failure to comply with discovery demands related to this counterclaim, the district court adopted the magistrate's recommendation that Hoar be precluded from offering any evidence that it had in fact passed through these promotional allowances ("the preclusion sanction"), and granted summary judgment. Hoar maintains that the district court erred in imposing the sanction of preclusion. It argues that the court abused its discretion because it failed to conduct a hearing or make specific findings whether Hoar — as opposed to its counsel — was responsible for the failure to comply with the discovery orders. However, Hoar failed to raise this argument in the court below. It is therefore forfeited. *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 527 (2d Cir. 1990) ("*Hoar I*"). We believe the district court acted within its discretion in imposing the sanction of preclusion and in granting summary judgment based an Hoar's failure to adduce any evidence that it passed through the promotional allowances as required.

We have considered Hoar's remaining arguments and find them to be without merit.

Accordingly, the judgment of the district court is **AFFIRMED**.

Appendix A

FOR THE COURT:
Carolyn Clark Campbell, Clerk

s/ Ralph A. Anderson
By: Ralph A. Anderson, Deputy Clerk

APPENDIX B — MEMORANDUM AND ORDER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED JULY 29, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(JLC)
86 CV 1738

THOMAS E. HOAR, INC.,

Plaintiff,

– against –

SARA LEE CORPORATION, et al.,

Defendants.

Memorandum and Order of Judgment

* * *

CADEN, United States Magistrate Judge.

Presently before the court is defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dated March 4, 1997. The motion seeks an order granting defendants summary judgment on plaintiff's Robbins claim by (1) dismissing plaintiff's injurious falsehood or defamation claim because the complaint fails to satisfy the pleading requirements for those torts, and (2) dismissing

plaintiff's claim for tortious interference with prospective economic advantage because the facts of this case do not satisfy the legal requirements of New York law for that tort. On May 13, 1997, plaintiff submitted its Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Leave to Amend its Complaint. On June 2, 1997, defendants submitted their Reply Memorandum in Support of Defendants' Motion for Summary Judgment on both Legal Bases of the Robbins Claim. On July 10, 1997, the undersigned heard oral argument on the motion. For the following reasons, defendants' two motions to dismiss the complaint and motion for summary judgment are granted. Plaintiff's motion for leave to amend the complaint is denied.

Background

1. *General Background*

Plaintiff brought this action against defendants on May 22, 1986, alleging, *inter alia*, violations of anti-trust laws, bad faith and breach of fiduciary duty.

This litigation arises from the deterioration of a thirty-year long business relationship between plaintiff Thomas R. Hoar, Inc. ("plaintiff" or "Hoar") and defendants Sara Lee Corporation, *et al.* ("defendants" or "Hanes"). Hanes is a manufacturer of men and boys underwear and other clothing items. Hoar was a wholesale distributor of Hanes merchandise at all times material to this action. Operating under a Franchise Agreement entered into on October 26, 1983, plaintiff purchased merchandise from Hanes and sold it to retailers. On or about June 10, 1986, Hanes exercised its option to terminate the Franchise Agreement.

Appendix B

In a Memorandum and Order dated May 8, 1996, the undersigned granted defendants' motion for partial summary judgment, dismissing all of plaintiff's claims except for its claim against defendants concerning the conversion of the Robbins account (the "Robbins claim"). Familiarity with the facts and circumstances of this litigation is assumed.[1]

2. *Robbins MBW*

Robbins Men's and Boys' Wear ("Robbins MBW") owned and operated a chain of stores that retailed men and boys' clothing staples, including underwear. Melvin L. Robbins ("Mr. Robbins") was the principal of Robbins MBW at all times material to this motion. (*See* Robbins Depo. at 5-6). Until January, 1986 Robbins MBW purchased its Hanes merchandise through Hoar. From 1979 to 1985, Hoar was the only wholesale distributor with which Robbins MBW dealt. (*Id.* at 55-56).

Robbins MBW's need for Hoar's services began to decline in September of 1977, when Robbins MBW acquired a warehouse of its own. (*Id.* at 38). As Robbins MBW became more financially secure, and as interest rates declined, Robbins MBW could afford to finance an inventory in its own warehouse, decreasing the need for Hoar's service. *Id.* at 60-62).

In the mid-1980's, the generally cordial business relationship between Hoar and Hanes began to sour and by 1985 Mr. Robbins and Robbins MBW's appreciation and need for Hoar's services had greatly declined. Mr. Robbins had become

---

1. The material facts relating to this motion are supplied almost entirely by the Declaration of Melvin L. Robbins, dated November 11, 1988 ("Robbins Decl.") and by his recent deposition testimony, dated January 24 and January 29, 1997 ("Robbins Depo.").

increasingly concerned about Hoar's ability to adequately supply him with merchandise in a timely manner. Over a period of two years, Hoar failed on several occasions to provide Robbins MBW with merchandise when needed, and despite repeated complaints, failed to alert Mr. Robbins about such delays so that he could avoid dissatisfying customers. (*Id.* at 173-174). Mr. Robbins's frustration towards these supply failures reached the "saturation point" in 1985, after Hoar failed to supply adequate inventory for three advertised sales in a row: a sale of men's underwear during the Christmas season of 1984; a sale of boys' underwear during the spring of 1985; and a sale of men's underwear for Memorial Day of 1985. (Robbins Decl. ¶ 6). In each case, Hoar knew that Robbins MBW was running a sale, yet failed to warn it that Hoar could not supply the inventory to meet the demand generated by the sale. (*Id.*).

In light of Hoar's failure to adequately supply Robbins MBW with merchandise, Mr. Robbins evaluated the business merits and disadvantages of continuing to purchase Hanes underwear from Hoar. (*Id*). At some point after Memorial Day, 1985, "it was apparent [to Mr. Robbins] . . . that there was no business justification for continuing to buy from Hoar." (*Id.* at ¶ 7 and Robbins Depo. at 180). He "therefore decided to contact Hanes" about buying directly from Hanes. (Robbins Decl. at ¶ 7). Mr. Robbins instructed his buyer to contact Hanes headquarters to speak to a Hanes representative about buying directly from Hanes. (Robbins Depo. at 83-84). At that point, Mr. Robbins made a "tentative decision" to stop buying from Hoar and to begin buying from Hanes. (Robbins Depo. at 152-153). Mr. Robbins's decision was tentative because Robbins MBW had not bought directly from Hanes for many years, and Mr. Robbins did not know whether Hanes would be willing to sell directly to Robbins MBW. (*Id.* at 183-184).

Appendix B

Robbins MSW placed an experimental order with Hanes in September of 1985. (*Id.* at 253-254). After negotiating a direct purchasing agreement with Hanes, Robbins MBW ceased its business relationship with Hoar on January 1, 1986 and began regular purchases of its Hanes merchandise directly from Hanes. (Robbins Decl. at ¶ 11).

3. *The Robbins Claim*

The Robbins claim seeks damages for Hoar's loss of Robbins MBW as a customer when Robbins MBW converted to direct purchasing from Hanes in late 1985. Hoar alleges that Hanes converted Robbins MBW, one of Hoar's major accounts, to a national account to be serviced directly by Hanes as a result of statements made by Hanes representatives to Robbins MBW's principal, Mr. Robbins. (*See*, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Leave to Amend its Complaint at 13) ("Pl. Mem.").

Hoar has identified two causes of action for damages as bases for the Robbins Claim: (1) injurious falsehood or defamation; and (2) tortious interference with prospective economic advantage ("tortious interference").

The gravamen of these claims is based on Hanes' alleged misrepresentations to Mr. Robbins that the reason Hoar failed to supply Robbins MSW with adequate inventory was that Hoar had "credit" or "late payment" problems. Plaintiff alleges that Hanes aggressively sought out national accounts and interfered with and impaired the sales, promotion and service activities of Hoar. Specifically, plaintiff alleges that Hanes' representatives converted Robbins MBW to a Hanes direct

account by making false statements to Mr. Robbins concerning Hoar, which caused Robbins MBW to end its relationship with Hoar.

4. *Issues presented in this Motion*

Defendants argue that both theories of liability upon which the Robbins claim is based should be dismissed on summary judgment. Defendants contend that the injurious falsehood or defamation claim should be dismissed because the complaint, filed on May 21, 1986, does not give notice of the alleged false statement on which the claim is based and fails to satisfy the pleading requirements for the torts of injurious falsehood and defamation. (Memorandum in Support of Defendants, Motion for Summary Judgment on both Legal Bases of the Robbins Claim at 2) ("Def. Mem."). Defendants argue that the tortious interference claim should be dismissed because the false statements on which this claim is based have not been adequately pleaded in the complaint. In addition, defendants argue that plaintiff cannot prove this tort under New York law.

In contrast, plaintiff argues that Hanes knew in 1995 that the false statements upon which the Robbins claim is based was Hanes' alleged misrepresentations that Hoar was unable to supply Robbins MBW with adequate inventory because it had credit and late payment problems. (Pl. Mem. at 3). Plaintiff contends that the complaint, both standing alone and when considered together with the record in this case, provides Hanes with ample notice of the Robbins claim. Further, plaintiff asserts that, to the extent the court finds that the complaint fails to adequately plead and give notice to Hanes of the Robbins claim, the court should grant Hoar leave to amend the complaint in order to rectify any such pleading deficiencies. (*Id.* at 3-4).

Appendix B

Discussion

I. *The law of the case doctrine is not a bar to this motion*

Plaintiff argues that this motion is barred by the doctrine of the law of the case. In 1988, Hanes moved for summary judgment, asking the court to dismiss Hoar's claims for lost profits based on the loss of Robbins MBW as a Hoar customer. In that motion defendants argued that summary judgment should be granted because the declaration given by Mr. Robbins on November 11, 1988 constituted indisputable evidence that "plaintiff's loss of Robbins as a customer was not the result of any act of Hanes." (*See* Memorandum in Support of Defendants' Motion for Summary Judgment, November 16, 1988, at 45). Then Chief Judge Platt denied that motion, holding without elaboration "that there are material issues of fact regarding . . . the switch of Robbins to a direct account that preclude summary judgment." (*See* Memorandum and Order of Chief Judge Platt, March 31, 1989 at 13).

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.' " *DiLaura v. Power Authority of State of N.Y.*, 982 F.2d. 73, 76 (2d Cir. 1992) (citations omitted); *Erie Conduit Corp. v. Metropolitan Asphalt Paving Ass'n*, 560 F. Supp. 305, 307 (E.D.N.Y. 1983) (quoting from Wright & Cooper, Federal Practice and Procedure, § 4478 at 788 (1981); "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit"). The doctrine is discretionary, however, expressing only a general practice not to reopen previously determined issues, rather than a limitation upon a court's ability

to reconsider earlier decisions prior to final judgment. *DiLaura*, 982 F.2d at 76; *Erie Conduit*, 650 F. Supp. at 30. The doctrine "does not necessarily apply where even the same question is presented to different judges of a single district court." *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603, 607 (E.D.N.Y. 1983). Factors justifying departure from the rule include situations in which "controlling authority has since made a contrary decision of the law applicable to such issues, or a decision was clearly erroneous and would work a manifest injustice." *Erie Conduit*, 560 F. Supp. 308 (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)).

Moreover, "a district court judge always has the power to change a previous ruling which denied a motion for summary judgment." *Blythe Indus., Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 607 F. Supp. 1388 (S.D.N.Y. 1985); *see also Wright v. Cayan*, 817 F.2d 999, 1002 n.3 (2d Cir.) (stating that "it is clear that a second judge has the power to grant summary judgment despite another judge's previous denial of summary judgment"), *cert. denied*, 484 U.S. 853 (1987); *Kostiuk*, 570 F. Supp. at 607 (acknowledging that "denial of a summary judgment motion by one judge does not foreclose grant of that motion by another judge").

The court finds that the doctrine of the law of the case has no application to this motion because the issues raised in this motion are substantially different than those raised before Judge Platt in 1989.

Defendants' prior motion was based on defendants' contention that the Robbins Declaration demonstrated that there was no issue of fact concerning Hanes' alleged conversion of Robbins. In contrast, this motion is addressed to the particular

legal theories that plaintiff has identified as the basis for the Robbins claim. Defendants argue that plaintiff's claims of injurious falsehood or defamation and tortious interference are not properly pleaded in the complaint and that the plaintiff cannot establish the requisite elements of a claim for tortious interference. This is the first time during this litigation that defendants have made these arguments with respect to the Robbins claim, and Judge Platt's ruling on the prior motion did not address or resolve them. Accordingly, the doctrine of the law of the case is not a bar to defendants' motion for summary judgment.

II. *Summary judgment standard*

A motion for summary judgment may not be granted unless the court determines that "there is no genuine issue of material fact and that the undisputed facts warrant judgment for the moving party as a matter of law." Fed. R. Civ. P. 56(c); *see generally*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The burden of showing that no genuine issue with respect to any material fact exists rests on the party seeking summary judgment. *See*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-161 (1970); *Donahue v. Windsor Locks Bd. of Fire Comm'rs.*, 834 F.2d 54, 57 (2d Cir. 1987). In examining the record in order to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *See*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Donahue*, 834 F.2d at 57; *Thompson v. Cjivoje*, 896 F.2d 716, 720 (2d Cir. 1990). A genuine issue of material fact exists if sufficient evidence shows that a reasonable jury would return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. However, the party opposing summary

judgment "may not rest upon the mere allegations or denial of [its] pleadings" but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e), Instead, the non-moving party must set forth specific facts as to the veracity of the moving party's allegations beyond the pleadings, affidavits, depositions, interrogatory answers, and admissions on file that show that a genuine issue of material fact exists for trial. *Celotex*, 477 U.S. at 324.

III. *Injurious Falsehood or Defamation*

A false and misleading statement harmful to the interests of another gives rise to a claim for injurious falsehood if (1) the statement is uttered or published maliciously and with the intent to harm another or done recklessly and without regard to its consequences and (2) a reasonably prudent person would or should anticipate that damage to another will naturally flow therefrom. *RMS Int'l Shipping v. Stemcor USA, Inc.*, No. 90 Civ. 4918, 1991 WL 136035 at *3 (S.D.N.Y. July 18, 1991).

Defendants contend that the complaint fails to state a claim for injurious falsehood or defamation because the complaint does not plead these torts expressly, and that even if the torts were construed to be pled by implication, the complaint fails to adequately identify the alleged false statements that were made concerning Hoar.

The court finds that the words "injurious falsehood" and "defamation" do not appear anywhere in the complaint. Although the complaint includes the word "disparagement," this is in the context of a claimed violation of fiduciary duty and breach of the covenant of good faith, not in terms of a claim for injurious falsehood or defamation. For example, paragraphs 117 and 118 of the complaint state in pertinent part:

> 117. In violation of this fiduciary relationship and in breach of the covenant of good faith and fair dealing, HANES and its co-conspirators have described Plaintiff to retailers in a disparaging way, demeaning its out of stock sales distribution system and the ability of Plaintiff to serve retailers effectively and competently.
>
> 118. As a direct and proximate result of HANES trade disparagement, Plaintiff has been damaged in its business and property in that it has lost and continues to lose existing customers at the retail level of distribution. . . .

(Complaint at ¶ 17-18).

Although plaintiff suggests that the complaint gives defendants notice that the Robbins claim is based on alleged disparaging statements made by Hanes regarding Hoar, the complaint neither alleges that any false statements were ever made by Hanes nor specifies the disparaging statements that were allegedly made. This is clearly a fatal pleading deficiency, as an essential element of the torts of injurious falsehood and defamation is a false statement. *RMS Int'l Shipping*, 1991 WL 136035, at *3 (S.D.N.Y. 1991).

Even if the complaint could be construed as asserting a claim for injurious falsehood or defamation, the complaint is deficient because these torts are not pled with the specificity required under the Federal Rules. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint "give the defendant fair notice of what the claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2). *See also*, *Conley v.*

Gibson, 355 U.S. 41, 47 (1957); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Furthermore, "[e]ach averment of a pleading shall be simple, concise, and direct." Fed. R. Civ. P. 8(e)(1). Rule 8's requirements are "designed to compel a plaintiff to identify the relevant circumstances that he claims entitle him to relief in such a manner that the defendants are provided with fair notice to enable them to answer and prepare for trial." *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626, 628 (S.D.N.Y. 1995). The complaint must give the defendant "sufficient notice of the communications complained to enable [them] to defend [themselves]." *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986), (*citing*, *Liguori v. Alexander*, 495 F. Supp. 641, 647 (S.D.N.Y. 1980)).

For torts based on false statements like defamation and injurious falsehood, Rule 8 requires a particular identification of the false statement allegedly made by the defendant. *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. at 628; *Riddell Sports Inc. v. Brooks*, 872 F. Supp. 73, 79-80 (S.D.N.Y. 1995). This requirement is even more stringent under New York law, where the exact words of the statement must be pleaded. N.Y.C.P.L.R. § 3016(a) (1990); *see also*, *Ott v. Automatic Connector, Inc.*, 193 A.D.2d 657, 598 N.Y.S.2d 10, 11 (2d Dep't 1993). In *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 763 (2d Cir. 1990), *cert. denied*, 499 U.S. 943 (1991), the Second Circuit affirmed the dismissal of claims for defamation and malicious injurious falsehood or disparagement brought under New York law because plaintiff "fail[ed] to plead adequately the actual words spoken . . ." *See also*, *Riddell Sports, Inc. v. Brooks*, 872 F. Supp. at 79-80 (dismissing plaintiff's injurious falsehood claim for failure to "set forth the particular words which caused the alleged injury"); Mount v. Ormand, No. 91 Civ. 0125, 1991 WL 191228, at *1 (S.D.N.Y. September 18, 1991) (dismissing

defamation claim for, *inter alia*, failure to allege the particular words at issue).

While federal law does not necessarily require that the alleged defamatory statements be pled *in haec verba*, *Pirre v. Printing Developments, Inc.*, 432 F. Supp. 840, 843 (S.D.N.Y. 1977), the failure to plead the alleged false statement with particularity requires dismissal of the claim. *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. at 628. In *Jones*, the court dismissed the defamation claim because the complaint failed to "recite[ ], paraphrase[ ], or identif[y] the alleged defamatory statements." (*Id.*) *See also*, *Ford v. Clement*, 834 F. Supp. 72, 78 (S.D.N.Y. 1993) (dismissing plaintiff's defamation claim because the complaint failed to allege the nature and content of the defendant's allegedly false statements, as well as when the allegedly false communications took place), *aff'd*, 29 F.3d 621 (2d Cir.) *cert. denied*, 513 U.S. 974 (1994).

Similarly, in *Wanamaker v. Columbian Rope Co.*, 713 F. Supp. 533, 545 (N.D.N.Y. 1989), *aff'd*, 108 F.3d 462 (2d Cir. 1997), the court dismissed a defamation claim for failure to allege the specific words, the time of the statement, the identity of the speaker, and the identity of any non-parties to whom statements were made. The court found the complaint "woefully lacking in the requisite specificity" and adopted the defendants' description of the complaint:

> [P]laintiff fails to refer to any statements which he alleges to be defamatory. His defamation claim consists solely of the vague, conclusory statement that defendants defamed him by speaking . . . malicious, untrue and damaging comments about his job performance. Plaintiff does not specify who

> made the comments, does not specify when they were made, fails to allude to the context in which they are alleged to have been made, significantly does not indicate whether or when they were communicated to a third party, does not allege whether they were written or oral, and does not set forth in any manner whatsoever the words which he claims are actionable so as to give defendants notice of the statements at issue.

Id.

At best, plaintiff's complaint, like the complaint in *Wanamaker*, contains only a vague and conclusory allegation that Hanes' representatives disparaged Hoar's performance as a distributor. The complaint fails to allege whether the statements made were written or oral, who made the statements and to whom they were made, when they were made, or in what context they were made. Specifically, the complaint does not allege that a representative of Hanes told Mr. Robbins that Hoar was having credit or late shipment problems.

By way of summary, the court finds that the complaint fails to sufficiently notify Hanes that it would be defending itself against claims for injurious falsehood and defamation. There is no mention of either of these torts in the complaint. In addition, even if the complaint could be construed as pleading these claims, the complaint fails in every respect to specify the alleged misrepresentations that were made to Mr. Robbins. Accordingly, plaintiff's claim for injurious falsehood and defamation is dismissed.

Appendix B

IV. *Tortious interference with prospective economic advantage*

To state a claim for tortious interference with prospective economic advantage under New York law, the plaintiff must allege that the defendant interfered with the business or economic relations between plaintiff and a third party, either with the sole purpose of harming the plaintiff or by dishonest, unfair or improper means. *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 269 (2d Cir. 1987). The plaintiff must also show that the interference would not have occurred but for the alleged conduct by the defendant. *All Boys Music, Ltd. v. DeGroot*, No. 89 Civ. 8258, 1992 WL 51502 at *9 (S.D.N.Y. March 9, 1992). However, if the defendant's interference was intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed by defendant included criminal or fraudulent conduct. *PPX Enterprises*, 818 F.2d at 269; *Defusco v. Horowitz*, No. 95 Civ. 1366, 1996 WL 94818 (S.D.N.Y. March 4, 1996); *Campo v. 1st National Bank*, 857 F. Supp. 264, 273 (E.D.N.Y. 1994); *Paper Corp. of the U.S. v. Schoeller Technical Papers, Inc.*, 724 F. Supp. 110, 119 (S.D.N.Y. 1989).

Plaintiff's claim for tortious interference must be dismissed for several reasons. First, for the same reasons plaintiff's injurious falsehood claim cannot stand, plaintiff's tortious interference claim must be dismissed because the alleged false statements on which the claim is based have not been adequately pleaded in the complaint. Second, plaintiff cannot show that defendants engaged in criminal or fraudulent conduct, which is an essential element of the tort on the facts of this case. Third, plaintiff cannot show that it would have continued to contract with Robbins MBW but for the alleged misstatements by Hanes' representative, as required by New York law for this tort. Any

of these reasons, standing alone, would be sufficient to dismiss plaintiff's claim for tortious interference.

1. *The tortious interference claim must be dismissed because the complaint does not plead the alleged false statements made to Mr. Robbins*

Plaintiff's tortious interference claim, like the injurious falsehood or defamation claim, is based on the alleged false statements that were made to Mr. Robbins concerning plaintiff. Plaintiff alleges that Hanes tortiously interfered with plaintiff's business relationship with Robbins MBW by making false statements to Mr. Robbins concerning plaintiff's credit and late payment problems; and that these statements persuaded Mr. Robbins to convert to direct purchasing from Hanes.

Although tortious interference and injurious falsehood are different torts, the deficiency of plaintiff's complaint has the same effect on both torts. *O'Brien v. Alexander*, 898 F. Supp. 162, 172 (S.D.N.Y. 1995), *aff'd in part, reversed in part*, 101 F.3d 1479 (2d Cir. 1996). In *O'Brien*, after the court dismissed the plaintiff's defamation claim in part for failing to plead the allegedly defamatory statements, the court dismissed the negligence and general tort claims because these torts were based on the same alleged defamatory statements which were inadequately pled in the complaint. Similarly, in *Belsky v. Lowenthal*, 62 A.D.2d 319, 322, 405 N.Y.S.2d 62, 65 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 820, 418 N.Y.S.2d 573 (1979), the court stated that:

> It would make little sense to hold that plaintiff may not prevail on a cause of action, having failed to establish certain elements, which are essential

> thereto, and then in the exercise of flexibility, apply a different name to it, and without correcting any of the fatal defects, permit the cause of action (absent a unique quality) to stand.

Therefore, plaintiff cannot escape the pleading requirements for injurious falsehood and defamation by repackaging certain alleged statements under the heading of a different tort.

The court finds that to require defendants to defend themselves against an unplead misrepresentation which allegedly occurred over a decade ago would be highly prejudicial to defendants. Accordingly, plaintiff's claim of tortious interference is dismissed for the same pleading deficiencies for which plaintiff's claim of injurious falsehood is dismissed.

2. *Plaintiff cannot show that defendants engaged in criminal or fraudulent conduct*

Under New York law, where the defendant's alleged tortious interference was intended, at least in part, to advance its own competing interests, plaintiff must show that the defendant engaged in criminal or fraudulent conduct. *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d at 269; *Campo v. 1st National Bank*, 857 F. Supp. at 273; *Paper Corp. of the United States v. Schoeller Technical Papers, Inc.*, 724 F. Supp. at 119.

There is no dispute that Hanes' alleged interference was intended, at least in part, to advance its interests. Indeed, plaintiff's primary contention is that Hanes wanted to convert Robbins MBW to a direct customer because Hanes viewed

direct accounts as more profitable than distributor accounts.[2] Therefore, plaintiff must allege that defendants' conduct included criminal or fraudulent conduct. The court finds that the complaint does neither.

Criminal conduct is neither mentioned nor suggested in the complaint. As for fraudulent conduct, as discussed above, the complaint fails to adequately allege the fraudulent misrepresentations with the particularity required by the Federal Rules. *See Defusco v. Horowitz*, No. 95 Civ. 1366, 1996 WL 94818 (S.D.N.Y. March 4, 1996) (dismissing tortious interference claim for failure to plead criminal or fraudulent conduct by defendant); *Alusit Ltd. v. Aluglas of Pennsylvania*, No. 89 Civ. 3849, 1990 WL 209422 (S.D.N.Y. Dec. 4, 1990) (dismissing tortious interference claim because the complaint failed to sufficiently allege criminal or fraudulent conduct). Accordingly, plaintiff's tortious interference claim must be dismissed because the complaint fails to allege that defendants engaged in criminal or fraudulent conduct.

3. *Plaintiff has failed to show that it would have kept Robbins MRW as a customer but for the alleged interference*

The court finds that plaintiff's claim of tortious interference must be dismissed because Hoar cannot show that Robbins MBW would have remained a Hoar customer but for the alleged wrongful statements by Hanes' representatives, as required by New York law.

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2. *See* Letter from Robert D. Owen to Magistrate Judge Caden, dated April 8, 1996, attached to Carpenter Declaration dated March 4, 1997 at Ex. 12) ("Carpenter Decl.") ("Hanes converted Hoar's major accounts and wanted Hoar out of the way so it could sell directly to them").

Appendix B

In *All Boys Music, Ltd. v. DeGroot*, No. 89 Civ. 8258, 1992 WL 51502, at *9 (S.D.N.Y. March 9, 1992), the court held that:

> New York courts construing the elements of tortious interference with prospective economic advantage have indicated that, in order to prevail on this theory, a plaintiff must demonstrate not only the existence of the relationship and the malicious or otherwise improper interference by the defendant, but also that "but for" the defendant's activities the plaintiff would have reaped the rewards of its beneficial association.

Thus, in order to "maintain an action for intentional interference with prospective economic advantage there 'must be some certainty that the plaintiff would have gotten the contract but for the defendant's interference.' " *Mandelblatt v. Devon Stores, Inc.*, 132 A.D.2d 162, 169, 521 N.Y.S.2d 672, 677 (1st Dep't 1987) (quoting *Williams & Co. v. Collins, Tuttle & Co.*, 6 A.D. 2d 302, 307, 176 N.Y.S. 2d 99, 104 (1st Dep't 1958); *see also*, *Gruber v. Victor*, No. 95 Civ. 2285, 1996 WL 492991, at *21-22 (S.D.N.Y. August 28, 1996) (granting summary judgment because counterclaimant could not show that but for plaintiff's interference he would have entered into sale and consulting agreements).

As recognized in *Union Car Adver. Co. v. Collier*, 263 N.Y. 386, 401, 189 N.E. 463, 470 (N.Y. 1934), the requirement that the plaintiff would have received prospective economic advantage but for an act of interference is fairly strict and "cannot be left to surmise or speculation." In *Williams & Co.*, 6 A.D. 2d at 307, 176 N.Y.S. 2d at 104, the court stated that the " 'would have received the contract' test is a stringent one . . .

[and] involves a higher standard of proof than what lawyers call mere probabilities . . . It is even a more stringent test than 'reasonably certain' or 'reasonable expectation.' "

Plaintiff contends that were it not for the interference of Hanes, "Hoar was reasonably certain to have continued its existing relationship with Robbins." (Pl. Mem. at 29). Plaintiff relies upon Mr. Robbins' deposition testimony to argue that Mr. Robbins decided to convert to Hanes after Jack Calkins, a Hanes representative, allegedly told Mr. Robbins that Hoar was experiencing credit and late payment problems. (*Id.* at 30). Specifically, plaintiff contends that:

> Mr. Robbins testified that Hanes['] misrepresentations were made "before" Robbins began direct shipments from Hanes and probably occurred "in the course of . . . negotiations as to whether [Robbins] would go direct with Hanes."

(Pl. Mem. at 33) (citing Robbins Depo. at 83).

Plaintiff suggests that Mr. Robbins' deposition creates an issue of fact concerning whether Mr. Robbins' decision to convert to Hanes can be attributed to the statements made to him by Mr. Calkins.

This court disagrees and finds that plaintiff's argument is based on a selective reading of Mr. Robbins' deposition.

In the face of Mr. Robbins' deposition, plaintiff cannot show that there is an issue of material fact concerning whether but for Hanes' alleged interference, Robbins MBW would have continued its business relationship with plaintiff. By late 1985

Mr. Robbins had made a "tentative decision" to "go direct with Hanes." (Robbins Depo. at 152-153). He had contacted Hanes himself with the intent of converting to direct purchasing as long as Hanes was willing and able to meet his business needs. (*Id.* at 182). According to Mr. Robbins, by the time the alleged statements were made to him, he had independently concluded that "there was no business justification for continuing to buy from Hoar." (Robbins Decl. at ¶ 7; *see also* Robbins Depo. at 180-182). Robbins MSW "needed the Hanes goods and the solution seemed to be to go direct with Hanes." (Robbins Depo. at 160). Mr. Robbins was "dissatisfied with Hoar and wanted to make a change." (*Id.* at 168). The only remaining questions Mr. Robbins had were whether Hanes would be willing to sell to Robbins MBW directly and whether Robbins MBW could obtain acceptable credit terms from Hanes. (*Id.* at 183, 259)

Plaintiff has not shown with the requisite certainty that Robbins MBW would have continued to buy from Hoar but for the alleged misstatements made about Hoar's credit and late payment problems. Mr. Robbins made the critical business decision to buy from Hanes because of Hoar's failure to supply Hanes merchandise when needed. (*Id.* at 153). He made this decision against a background of accumulated frustration and dissatisfaction, leading him to conclude that he "couldn't live with [Hoar] any longer." (*Id.* at 210, 216). By the time Robbins MBW switched to direct purchasing from Hanes, Mr. Robbins was "fed up with the relationship with Hoar where [he] had been disappointed too many times." (*Id.* at 125).

The court finds that even if the alleged misstatements made to Mr. Robbins were a factor in Mr. Robbins' final decision to convert to Hanes, there is no basis to find that but for the misrepresentation, Mr. Robbins' decision would have been

different. Accordingly, plaintiff's claim for tortious interference is dismissed.

V. *Pleading deficiencies cannot be rectified by the record*

Plaintiff contends that "[s]hould the Complaint be found to suffer from any pleading deficiencies, they are remedied by the ample record compiled after issue was joined." (Pl. Mem. at 16). Plaintiff argues that the record that has developed in this case during the last ten years has "afforded Hanes clear notice" (*Id.* at 16-17) of the factual basis of the Robbins claim. Specifically, plaintiff relies upon: (1) the depositions that were taken by plaintiff of present and former officers of Hanes; (2) Plaintiff's Opposition to Defendants' Partial Summary Judgment Motion in November 1995; (3) Plaintiff's Statement of Material Facts, dated January 12, 1996; and (4) Robert D. Owen's (plaintiff's attorney) affidavit dated January 12, 1996.

Plaintiff's argument is without merit. A failure to comply with a pleading requirement designed to give timely notice of the particular basis for a claim cannot be cured by material subsequently introduced into the record. *See e.g.*, *Three Crown Ltd. Partnership v. Caxton Corp.*, 817 F. Supp. 1033 (S.D.N.Y. 1993). In *Three Crown*, the court dismissed a complaint for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b), rejecting the plaintiff's argument that the pleading had been cured by extensive materials in the records. The court stated that:

> Since 9(b) . . . is a rule of pleading, only plaintiff's complaint may be examined to determine whether the rule has been satisfied; allegations made in briefs, affidavits, supplemental letters, or complaints

> submitted by other plaintiffs do not satisfy the Rule 9(b) pleading requirement.

(*Id.* at 1041 n.13). *See also*, *Branch v. Tower Air, Inc.*, No. 94 Civ. 6625, 1995 WL 649935 at *6 (S.D.N.Y. November 3, 1995) (holding that on a motion to dismiss, memoranda and supporting affidavits, together with supporting documentation "cannot be used to cure a defective complaint"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss"), *cert. denied*, 470 U.S. 1054 (1985); *Goldberg v. Meridor*, 83 F.R.D. 105, 111 (S.D.N.Y. 1979) (affidavits cannot cure the lack of specificity in a fraud complaint).

Therefore, plaintiff's pleading deficiencies cannot be remedied by any subsequent documentation that was provided to defendants regarding the factual and legal foundation for the Robbins claim. Defendants cannot be expected to piece together the basis of the Robbins claim from the discovery that has taken place in this case. This would be both prejudicial to the defendants and violative of the pleading requirements of the Federal Rules.

VI. *Plaintiff is not granted leave to amend the complaint*

Plaintiff suggests that the court treat its opposition papers as a motion for leave to amend the complaint, or if the court declines to do so, the court should grant plaintiff leave to make a cross-motion to amend the complaint.

At a conference before me on June 6, 1996, I cautioned plaintiff's counsel that there would be no amendment to the complaint:

Appendix B

> But now it seems to me we have a complaint, and that complaint . . . by which we extrapolate whatever it is that we extrapolate. That complaint is not going to be the subject of motions to amend the complaint, motions to oppose the amendment of the complaint, because as far as I'm concerned that's never where we were going.
>
> I was going to give the plaintiff every opportunity to develop within the context of that complaint, whatever it meant, the four corners of it, to prove whatever he could with any of those causes of action, anything he could prove, but we have to live with that complaint. That's the bottom line. We have to live with that.

(Transcript of conference before Magistrate Judge Caden, dated June 6, 1996 at 31-32). Plaintiff has disregarded the direction I made to the parties at the June 6, 1996 conference.

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has identified both "undue delay" and "undue prejudice to the opposing party" as factors to be considered in determining whether an amendment should be allowed. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Both of there factors require denial of plaintiff's motions. For the reasons more fully described below, plaintiff's motion to amend and motion for leave to make a cross-motion to amend are denied.

Appendix B

1. *Undue delay*

Plaintiff's motion to amend the complaint must be denied because it comes eleven years after the complaint was originally filed. Plaintiff has failed to cite any case law in which leave to amend was granted eleven years after the filing of the complaint. Indeed, the longest delay cited by plaintiff was five years, which is not even half the delay in this case.

"Mere delay", by itself, is not ordinarily a sufficient reason to deny leave to amend. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). However, where the passage of time rises to the level of "undue" or "excessive" delay, several courts have held that leave to amend may be denied on that basis alone. *Hester v. Int'l Union of Operating Engineers, AFL-CIO*, 941 F.2d 1574, 1579 (11th Cir. 1991) (affirming denial of motion for leave to amend as untimely); *Quaker State Oil Refining Corp. v. Garrity Oil Co., Inc.*, 884 F.2d 1510, 1517-18 (1st Cir. 1989) (denying leave to amend counterclaim where leave was sought near the close of discovery and nearly two years after the suit was brought); *Grupke v. Linda Lori Sportswear, Inc.*, 921 F. Supp. 987, 992 (E.D.N.Y. 1996) ("A court may also deny a motion to amend on account of 'undue delay' "). The court finds that an eleven year delay is clearly both "undue" and "excessive" by any measure.

Further, plaintiff has not offered any explanation for its delay in moving to amend the complaint. A party moving to amend the complaint bears the burden of showing a valid reason for the delay. *Evans v. Syracuse City School Dist.*, 704 F.2d 44, 47 (2d Cir. 1983); *Phaneuf v. Tenneco, Inc.*, 938 F. Supp. 112, 115-16 (N.D.N.Y. 1996) (motion to amend denied when made almost three years after filing of the complaint and the movant did not offer any explanation for the delay).

Appendix B

The court finds that plaintiff's motion to amend comes many years too late and accordingly it must be denied.

2. *The amendment would be prejudicial to defendants*

In addition to the unexplained delay, the motion must be denied because of the prejudice defendants would suffer in attempting to defend against alleged false statements of which it had insufficient notice. The court in *Block*, 988 F.2d at 350, stated that "the longer the period of an unexplained delay, the less will be required of the moving party in terms of showing of prejudice." (*quoting*, *Evans*, 704 F.2d at 47).

If plaintiff was permitted to amend its complaint, defendants would be prejudiced because they would be unable to ascertain and preserve the memories of certain witnesses, specifically Mr. Robbins, Martin Arshansky (Robbins MBW's principal buyer), Jack Calkins and Dan Sciandra (Hanes representatives), as well as other knowledgeable witnesses. These witnesses potentially had specific knowledge and recollection of the substance, timing and circumstances of the alleged false statements that were made to Mr. Robbins in 1985. However, with the passage of eleven years, defendants have lost the opportunity to elicit their testimony.

It is unfair and prejudicial to force defendants to reconstruct history which took place over a decade ago. In *Fuller v. Marx*, 724 F.2d 717, 721 (8th Cir. 1984), the Eighth Circuit affirmed a refusal to allow an amended complaint to relate back to the original complaint because of the prejudice to the defendant caused by "[t]he effects of the passage of time, which include faulty memories and missing witnesses." The court characterized these problems as "particularly severe in this case,

where . . . conversations held four years ago would have to be somehow remembered." *Id.* Here, the complaint did not give defendants sufficient notice of the Robbins claim. Defendants cannot be expected to base its defense of the Robbins claim on the deposition of Mr. Robbins alone, which is based on memories that have faded with the passage of eleven years.

In addition, where, as here, the gravamen of plaintiff's claim is a false statement, it would be especially prejudicial to defendants to allow the claim to be amended after such an extraordinary lapse of time. The statute of limitations governing the tort of injurious falsehood is one year. N.Y.C.P.L.R. § 215(3).[3] The short limitations period for injurious falsehood actions is an "expression of legislative policy" to "encourage[ ] [such] actions while the pertinent facts are still fresh." *In re Value Line Special Situations Fund Litig.*, 420 F. Supp. 125, 128 (S.D.N.Y. 1976). To allow plaintiff to amend the complaint more than eleven years after the alleged misrepresentation was made would violate this legislative policy.

Plaintiff argues that defendants have not been prejudiced because they could have asked Mr. Robbins in 1988, when obtaining his declaration, specific questions about paragraph 66(h) of the complaint which alleges that Hanes described Hoar in a disparaging way. (Pl. Mem. at 46). However, plaintiff ignores Mr. Robbins' declaration, wherein he states that "[a]t no time did anyone from Hanes approach me about converting to direct purchasing, or attempt to persuade me that I would be better off buying from Hanes than from Hoar. No one from Hanes said anything negative or disparaging about Hoar." (Robbins Decl. at ¶ 12). Therefore, defendants could not have

3. The statute of limitations governing tortious interference with prospective economic advantage is three years. N.Y.C.P.L.R. § 214(5).

known from Mr. Robbins in 1988 that Hanes' representatives allegedly made statements about plaintiff's credit or late payment problems. Defendants should have been made aware of any alleged misstatements made by its representatives through the complaint.

Further, the fact that plaintiff's motion to amend the complaint was filed only in response to defendants' motion for summary judgment substantiates the denial of plaintiff's motion. *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 739 F. Supp. 158, 166 (S.D.N.Y. 1990) (motion to amend made after "a motion for summary judgment had been filed . . . is particularly disfavored because of the resultant prejudice to defendant").

Accordingly, the court denies plaintiff's motion to amend the complaint and its motion for leave to make a cross-motion to amend the complaint.

Conclusion

For the reasons stated above, the court dismisses plaintiff's claims for injurious falsehood and defamation and tortious interference because these claims have not been adequately pleaded in the complaint. The court also dismisses plaintiff's claim for tortious interference because plaintiff has failed to show that it can establish the elements of this tort under the requirements of New York law. Accordingly, defendants, motion for summary judgment is granted.

Plaintiff's cross-motion to amend the complaint is denied. The case is dismissed. The Clerk of Court will close the file.

Appendix B

SO ORDERED.

s/ John L. Caden
JOHN L. CADEN
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
July 29, 1997

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MAY 8, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS HOAR, INC.,

Plaintiff,

- against -

SARA LEE CORPORATION, *et al.*,

Defendants.

Memorandum and Order
86 CV 1738
(JLC)

* * *

CADEN, United States Magistrate Judge.

By letter dated May 31, 1995, the parties in the above-captioned civil matter consented to have this action heard by the undersigned for all purposes including the entry of judgment. Presently before the court is defendants' motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion seeks a judgment that defendants' termination of its franchise agreement with plaintiff for non-payment was valid notwithstanding plaintiff's claims that the breach was provoked by defendants' tortious conduct, bad faith and breach of fiduciary duty. On March 29, 1996, the

undersigned heard oral argument on the matter. For reasons more fully explained below, the motion is granted.

BACKGROUND

This litigation arises from the deterioration of a thirty-year old distributorship relationship between plaintiff Thomas Hoar, Inc. ("plaintiff" or "Hoar") and defendants Sara Lee Corporation, *et al.* ("Hanes").

Hanes is a manufacturer of men's and boys' underwear and other clothing items. Operating under a Franchise Agreement entered into on October 26, 1983 (the "Agreement"), plaintiff purchased merchandise from Hanes and sold it to retailers. Franchise Agreement ¶ 3, Declaration of Russell H. Carpenter, Jr., November 22, 1995 ("Carpenter Decl.") Ex. 2. Unless otherwise described as alleged, the following facts are undisputed for the purposes of this motion.

A. *Pre-Termination*

Historically, Hanes had relied heavily on its distributors to reach the marketplace. As one of Hanes' oldest distributors, plaintiff relied on Hanes to supply ninety percent (90%) of the goods it sold. In the mid-1980's, however, the mutually beneficial and generally cordial business relationship began to sour when it became clear that Hanes wished to terminate the distributorship and persuade plaintiff's clients to buy directly from Hanes. Plaintiff alleges that beginning in 1985, Hanes: 1) approached its clients in a deliberate attempt to solicit their business; 2) successfully converted one of its major clients, Robbins Men's and Boys' Wear ("Robbins"), by falsely telling the client that plaintiff could not deliver needed merchandise

due to credit problems; 3) refused to communicate with plaintiff for several months and kept a record of plaintiff's actions in an effort to build a case for termination; and 4) refused to ship merchandise to plaintiff until plaintiff paid a shortage claim when the disputed amount was only 0.3% of plaintiff's annual volume. Pl. Mem. at pp. 7-12; Def. Reply Mem. (corrected copy) at pp. 5-7.

Tensions between the two companies reached a climax in 1986 when Hanes sought to audit plaintiff's compliance with certain promotional allowances claimed by plaintiff to have been passed on to its customers. Believing the audit to be a "set up" for termination, plaintiff brought a lawsuit against Hanes alleging, inter alia, violations of anti-trust laws, bad faith, and breach of fiduciary duty.

B. *Termination for Non-Payment*

As of May 22, 1986, the date this lawsuit was filed, plaintiff decided to withhold payment on invoices for merchandise ordered and received from Hanes in the ordinary course of business. Hoar, Jr., Aff. ¶ 21 (Pl. Aff. Opp'n. and Responsive Rule 3(g) Statement). Under the terms of the Agreement, payment for merchandise was due within thirty days of the date of the invoice. Franchise Agreement ¶ 3 (Carpenter Decl., Ex. 2). Under a modified payment schedule that extended the thirty-day deadline, plaintiff's payment on invoices in excess of $350,000 was due on May 26, 1986. An additional amount in excess of $150,000 was due in June. Pl. 3(g) Statement (¶ II-2), Aff. of David S. Peoples, ¶¶ 4 and 12 (Carpenter Decl. Ex. 4).

On or about June 2, 1986, Hanes credit manager David Peoples telephoned Hoar President, Thomas E. Hoar, Jr., about

the overdue invoices. Pl. 3(g) Statement ¶ II-3; Peoples Aff., ¶ 6 (Carpenter Decl., Ex. 4). In response to his inquires, Thomas Hoar Jr. told Mr. Peoples to telephone Hoar's attorney. On June 10, 1986, Mr. Peoples contacted Hoar's attorney and spoke with one of his partners. Mr. Jaffe, who told him that Hanes' recourse would be to file a counterclaim in this case. In response to plaintiff's breach, Hanes exercised its option to terminate the Agreement.

Hanes' right to terminate for non-payment is expressly permitted by the Agreement. Under the terms of the Agreement either party may terminate the distributorship upon breach by the other party by giving written notice. The notice becomes effective sixty (60) days after dispatch. Franchise Agreement ¶ 8 (Carpenter Decl., Ex. 2). The Agreement indicates that failure to make timely invoice payments constitutes grounds for termination. Specifically, the Agreement provides:

> The assessment of [a service charge on past due accounts] shall not be construed as a waiver of any rights of HANES under this Agreement, including specifically its right to withhold shipments of Hanes Merchandise ordered by DISTRIBUTOR, or to terminate this agreement in accordance with the provisions of paragraph 9, on account of a breach by DISTRIBUTOR of its obligation to make timely payments in accordance with this paragraph.

Franchise Agreement ¶ 3 (Carpenter Decl., Ex. 2). By letter dated June 13, 1986, Hanes notified plaintiff that it was terminating the distributorship for non-payment. Dep. of Richard Dally, June 4, 1987 and September 13, 1995, Reply Declaration of Russell H. Carpenter, Jr., February 6, 1996. ("Carpenter Reply Decl.") Ex. 2. Thomas Hoar Jr. responded

to the notice by letter dated June 23, 1986. The letter stated that the premise for termination was incorrect because the issue as to whether Hoar had refused to pay a debt that was "justly due and owing" remained to be resolved in the recently commenced lawsuit. (Carpenter Decl., Ex. 12). Subsequently, Hanes counterclaimed for the overdue amounts.

On September 17, 1987, United States District Judge Thomas C. Platt granted Hanes' motion for partial summary judgment on its counterclaim and ordered plaintiff to pay $545,351.68, together with the service charge at a rate of twelve percent (12%) interest. Order and Judgment on Defendant Hanes Knitwear's Motion for Partial Summary Judgment (Count I of the Counterclaim), September 17, 1987 (Carpenter Decl., Ex. 1). At no time prior to the Court's order did plaintiff attempt to pay the amounts due and owing.

C. *Issues Presented on this Motion*

Plaintiff now argues that the termination was null and void and without effect because it was provoked through tortious conduct, bad faith, and breach of a fiduciary duty owed by Hanes to plaintiff. Hanes contends that it had the legal right to terminate plaintiff for non-payment under the express terms of the Agreement and that its exercise of that right is unaffected by plaintiff's allegations that it had other reasons for doing so. Although Hanes denies plaintiff's conspiracy theory, for the purposes of this motion, Hanes concedes that prior to plaintiff's termination, Hanes personnel had, in fact, intended to contrive another ground for termination with the motives ascribed to them by plaintiff and that these motives contributed to Hanes' decision to exercise its right to terminate the Agreement due to plaintiff's non-payment. See Def. Mem. at 8. As to the circumstances surrounding plaintiff's breach, Hanes asserts that

any possible factual dispute was resolved by Judge Platt's grant of Hanes' summary judgment requiring plaintiff to pay the overdue invoices.

This motion is limited to a determination as to whether Hanes' termination of plaintiff was valid and effective. Therefore, plaintiff's claim based on the alleged wrongful conversion of its client Robbins is unaffected by this motion. *See* Def. Mem. at 1, 3 n.3.

DISCUSSION

I. Doctrine of Law of the Case is Not a Bar to this Motion

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.' " *DiLaura v. Power Authority*, 982 F.2d 73, 76 (2d Cir. 1992) (citations omitted); *Erie Conduit Corp. v. Metropolitan Asphalt Paving Ass'n*, 560 F. Supp. 305, 307 (E.D.N.Y. 1983) (quoting from Wright & Cooper, Federal Practice and Procedure, § 4478: "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit."). The doctrine is discretionary, however, expressing only a general practice not to reopen previously determined issues, rather than a limitation upon a court's ability to reconsider earlier decisions prior to final judgment. *DiLaura*, 982 F.2d at 76; *Erie Conduit*, 650 F. Supp. at 30, The doctrine "does not necessarily apply where even the same question is presented to different judges of a single district court." *Kostiuk v. Town of Riverhead*, 570 F.Supp. 603, 607 (E.D.N.Y. 1983). Factors justifying departure from the rule include situations in which "controlling authority has since

made a contrary decision of the law applicable to such issues, or decision was clearly erroneous and would work a manifest injustice." *Erie Conduit*, 560 F. Supp. 308 (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)).

Moreover, "a district court judge always has the power to change a previous ruling which denied a motion for summary judgment." *Blythe Indus., Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 607 F.Supp. 1388 (S.D.N.Y.) 1985); *see also Wright v. Cavan*, 817 F.2d 999, 1002 n.3 (stating that "it is clear that a second judge has the power to grant summary judgment despite another judge's previous denial of summary judgment."), *cert. denied*, 484 U.S. 853 (1987); *Kostiuk*, 570 F.Supp. at 607 (acknowledging that "denial of a summary judgment motion by one judge does not foreclose grant of that motion by another judge.").

In this case, the doctrine has no application because the issues raised in this motion are substantially different than those raised in Judge Platt's 1989 denial of Hanes' motion to dismiss plaintiff's claims for damages. In the prior motion, Hanes claimed that its termination for non-payment was its sole motivation for terminating the Agreement. Def. 3(g) Statement ¶ 33, November 16, 1988 (Carpenter Decl., Ex. 5). For the same reasons as it does here, plaintiff denied this contention. Pl. Response to Def. 3(g) Statement ¶ 33, December 12, 1988 (Carpenter Decl., Ex. 6). Consequently, the court denied the motion finding material issues of fact regarding plaintiff's lost profits claim. The court's one paragraph reference to the termination issue did not otherwise discuss the matter. By contrast, for the purposes of this motion Hanes does not dispute that it was motivated by other factors, including those attributed to it by the plaintiff, in exercising its contractual right to

terminate for non-payment. Def. Mem. at 8. Accordingly, the doctrine of law of the case is not a bar to the motion presented here.

II. Summary Judgment Standard

A motion for summary judgment may not be granted unless the court determines that "there is no genuine issue of material fact and that the undisputed facts warrant judgment for the moving party as a matter of law." *See* Fed. R. Civ. P. 56(c); *see generally*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The burden of showing that no genuine issue with respect to any material fact exists rests on the party seeking summary judgment. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-161 (1970); *Donahue v. Windsor Locks Bd. of Fire Comm'rs.*, 834 F.2d 54, 57 (2d Cir. 1987). In examining the record in order to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *See Anderson v. Libby Lobby Inc.*, 477 U.S. 242, 255 (1986); *Donahue*, 834 F.2d at 57; *Thompson v. Glivoje*, 896 F.2d 716, 720 (2d Cir. 1990). A genuine issue of material fact exists if sufficient evidence shows that a reasonable jury would return a verdict for the non-movant. *Anderson v. Libby Lobby, Inc.*, 477 U.S. at 249. However, the party opposing summary judgment "may not rest upon the mere allegations or denial of [its] pleadings" but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(a). Instead, the non-moving party must set forth specific facts as to the veracity of the moving party's allegations beyond the pleadings, affidavits, depositions, interrogatory answers, and admissions on file that show that a genuine issue of material fact exists for trial. *Celotex*, 477 U.S. at 324.

In this case, there are no genuine issues of material fact because Hanes concedes for the purposes of the motion that its decision to terminate plaintiff for non-payment was motivated by factors ascribed to it by plaintiff and the undisputed facts surrounding plaintiff's breach warrant judgment for Hanes as a matter of law.

III. Implied Covenant of Good Faith and Fair Dealing

A. *Applicable Law*

The Agreement by its terms is governed by North Carolina Law. Under New York State choice of law principles, North Carolina law is also applicable to a claim based on the implied duty of good faith. *A.S. Rampell, Inc. v. Hyster Co.*, 3. N.Y.2d 369, 382, 165 N.Y.S. 2d 475, 486 (1957).

The issue presented for the court's decision is whether a bad faith motive can render a for-cause contract termination ineffective when the terminating party exercised its right based on the other party's breach of a contractually specific obligation. Although North Carolina recognizes that every contract contains an implied covenant of good faith and fair dealing. *See Mezzanette v. Freeland*, 200 S.E.2d 410 (N.C. Ct. App. 1973); *Wayerhauser Co. v. Godwin Building Supply Co.*, 40 N.C. App. 743, 253 S.E. 2d 625 (1979); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 988-989 (1981), this court has been unable to find any North Carolina cases directly on point.[1]

1. In *United Roasters*, the Fourth Circuit, finding no guidance in North Carolina cases, declined to speculate as to whether North Carolina might recognize the principle of good faith as applied to a franchisor's unconditional right to terminate a franchisee. 649 F.2d at 988-989. This case, in contrast, concerns a for-cause franchise agreement and an unambiguous termination provision.

Appendix C

Relying on *Seven-Up Bottling Co. (Bangkok), Ltd. v. PepsiCo Inc.*, Hanes contends that in the absence of reason to believe that North Carolina law would differ, this court should apply to New York law. 686 F.Supp. 1015 (S.D.N.Y. 1988). However, in *Seven-Up*, the court applied New York law because the parties agreed that the law of the Kingdom of Thailand and the law of New York were not fundamentally dissimilar. By contrast, in this case the parties have made no such agreement. More importantly, there are no North Carolina cases upon which to base a comparison between the laws of New York and North Carolina on the issue presented in this case.

Since mere difficulty of decision or absence of prior state court rulings is not a proper ground for abstention, this court may not abstain. *See In Re Joint Eastern and Southern District Asbestos Litigation*, 78 F.3d 764, 776 (2d. Cir. 1996). Rather "[t]he district court faced with unclear state law is required to 'determine what it believes [the] state's highest court would find if the issues were before it', and to apply that determination to the facts of the federal proceeding." *Id.* (citing *Plumer v. Lederle Laboratories*, 819 F.2d 349, 355 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987); *see also Bensmiller v. E.I. Dupont de Nemours & Co.*, 47 F.3d 79, 82 (2d Cir. 1995).

E. *Good Cause Constitutes Good Faith*

It is well-settled that the existence of good cause itself constitutes good faith and makes any allegations of other improper motives irrelevant to a determination of good faith performance. In his oft-cited treatise, Corbin explains the rationale behind this general proposition of contract law:

> The existence of a prohibited motive is not conclusive that the actor was in bad faith, in many

> cases. The law often allows a privilege to take certain kinds of actions, regardless of the actor's motives. The privilege is given, not because the particular motive is approved, but because the needs of commerce . . . require such a privilege.
>
> The most widely recognized privilege to act regardless of motive is furnished by the existence of good cause. Many cases recognize that good cause to take particular action will constitute a defense to a finding that the actor is in bad faith. (citations omitted).

Corbin, *Corbin on Contracts*, Vol. 3A, § 654D, 1994. (citing, *e.g.*, *Coleman v. Graybar Elec. Co.* 195 F.2d 374 (5th Cir. 1952); *Roberts v. Mays Mills, Inc.*, 184 N.C. 406, 114 S.E. 530 (1922); *Sinnett v. Hie Food Prods.*, 185 Neb. 221, 174 N.W. 2d 720 (1970); *Thompson v. Burr*, 260 Or. 329, 490 P.2d 157 (1971); *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973); *Phelps Dodge Corp. v. Brown*, 112 Ariz. 179, 540 P.2d 651, 653 (1975); *In re Montgomery*, 518 F.2d 1174 (4th Cir. 1975); *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W. 2d 196 (Ky. 1964).

The paradigm case which illustrates the Corbin principle is *Dayan v. McDonald's Corporation*, 125 Ill. App. 3d 972, 466 N.E. 2d 958 (1984). In *Dayan*, the plaintiff-franchisee brought suit to enjoin McDonald's from terminating its franchise agreement for noncompliance with McDonald's quality standards. The plaintiff argued McDonald's true motive for termination was its desire to recapture the lucrative Paris market and that this impermissible motive was in breach of the covenant of good faith. The court, citing Corbin, held that a

franchisor satisfies the implied covenant of good faith where it has good cause for termination, regardless of other motives the franchisor may have had. *Id.* at 991.

Other cases have stated the principle differently. For example, in *Refinemet International Company v. Eastbourne N.V.*, the plaintiff argued that the defendant had used a breach of its indemnification agreement as a pretext to terminate and thereby avoid future liability as plaintiff's indemnitor. 815 F.Supp. 738, 742 (S.D.N.Y. 1993). The Court rejected this argument. Since the defendant had a legal right to terminate the contract, the Court found that it was "legally irrelevant whether [defendant] was also motivated by reasons which would not themselves constitute valid grounds for termination of the contract." *Id.* [citing *Loma Linda Univ. v. District-Realty Title Ins. Corp.*, 443 F.2d 773, 779 (D.C. Cir. 1971). Similarly, in *Palombi v. Getty Oil Company* the Court held that "if a franchisor can show at least one legally sufficient reason to terminate, the termination is valid." 501 F.Supp. 158, 161. The Court explained that "[t]he law could not reasonably be otherwise. A rule to the contrary would require courts to reexamine the reasonableness of an exercise of business judgment." *Id.* In *Newfield v. General Motors Corporation*, the Court held that an automobile manufacturer's "real motive" for terminating a dealer was irrelevant to the validity of the termination because "the undisputed fact remains that it timely acted to terminate the franchise upon a cause explicitly set forth in the franchise agreement." 84 A.D.2d 548, 549, 443 N.Y.S.2d 239, 241 (1981).

In short, it is a well-established rule, followed by courts in other states, that where the basis for termination is an undisputed breach of an unambiguous contract provision, the termination

may not be rendered invalid by the fact that the terminating party was motivated by other improper or "bad faith" reasons. It is reasonable to believe that North Carolina would apply the rule to this case. Accordingly, this court finds the implied covenant of good faith and fair dealing was not violated when Hanes terminated plaintiff for failure to pay a debt admittedly due and owing under the for cause contract. Therefore, plaintiff's claim does not preclude this motion for partial summary judgment.

IV. Provocation of Breach

While admitting that Hanes' alleged bad faith did not relieve it of its payment obligations, plaintiff argues that Hanes cannot rely on non-payment as the basis for termination because Hanes' bad faith pre-termination conduct provoked the breach. Pl. Mem. Opp'n. at 44; Pl. Sur-Reply at 4. This claim is wholly without merit.

A. *Plaintiff's Provocation Claim Has No Basis in Law*

Plaintiff's only cited reference to 'provocation' as a defense to termination for breach is in the special master's findings described by the court in *Baker Industries, Inc. v. Cerberus, Ltd.* 570 F. Supp. 1237 (D.N.J. 1983). In *Baker*, the parties agreed to have a special master finally determine a dispute concerning, *inter alia*, the propriety of the termination of the parties licensing agreement. Although the special master found that the plaintiff had breached the agreement, he nevertheless found that the breach did not give the defendant the right to terminate because the defendant's failure to cooperate with the plaintiff as required by the agreement was "provoked, and therefore excuse[d]" the plaintiff's failure to cooperate. *Id.* at

1246-1247. In making these findings, the special master did not cite any legal authority or principle. *Baker* is of no precedential value and lends no weight as to a statement of the law of North Carolina. Because an arbitrator's unreviewed findings and conclusions are not judicial precedent, *Baker* is not controlling here. *See, e.g., Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 483 (3d Cir. 1981), *aff'd*, 457 U.S. 702 (1982).

Plaintiff also cites several cases which recite the general principle that a party is precluded from recovering damages for nonperformance where it sanctions or causes the occurrence or non-occurrence of a condition or breach by the other party. *E.g., Patterson v. Meyerhofer* 204 N.Y. 96, 100-101 (1912); *Conthur Development Co. v. Dacar Garage Corp.*, 119 Misc. 2d 410, 417, 463 N.Y.S.2d 157, 159 (N.Y. Civ. Ct. 1983); *Marisa Christina, Inc. v. Freis*, 646 F. Supp. 252, 254 (S.D.N.Y. 1986). The cases cited by plaintiff apply the well-settled rule that where a promisee prevents the promisor from fulfilling its obligation, the promisee may not use the failure to perform as an excuse to terminate the contract. *See Restatement (Second) of Contracts* §§ 205, 225, 237 (1979); 6 *Corbin on Contracts* § 1264, at 47-48 (1962). The causation referred to in these prevention cases is objective. Thus, non-performance is excused only where a party by its affirmative conduct, made performance impossible or substantially more difficult. *See e.g., United States v. Russell Elec. Co.*, 250 F. Supp. 2, 23 (S.D.N.Y. 1965); *Canterbury Realty & Equip. Corp. v. Poughkeepsie Savs. Bank*, 135 A.D. 2d 102, 107-108, 524 N.Y.S. 2d 531, 535 (3d Dep't. 1988). However, plaintiff has alleged no actions by Hanes that in any way affected its ability to pay for the goods it received and kept without payment. On the contrary, plaintiff admits that it was fully able to pay. Plaintiff's 3(g) Statement.

Appendix C

¶ I-A-10. Further, plaintiff has made no claim that Hanes refused to accept a timely payment or that its actions led plaintiff to believe that the payment obligation was suspended. Therefore, the doctrine of a breach caused by preventing performance has no application here.

Plaintiff also cites cases in which terminations have been invalidated on theories other than the prevention/causation theory. For example, plaintiff argues that the implied duty of good faith precludes Hanes from relying on a breach of its payment obligation because the decision to withhold payment was made as a result of an alleged pre-termination breach of that duty. In support of this argument, plaintiff relies on *Travellers Intern., A.G. v. Trans World Airlines*, 41 F.3d 1570 (2d Cir. 1994).

In *Travellers*, a tour operator brought suit against an airline alleging that its joint venture agreement was wrongfully terminated. The language of the agreement required the parties to consult each other and cooperate in their efforts to generate the minimum number of targeted passengers for the joint venture. If the plaintiff did not get a certain number of customers to sign up each year, the airline had the right to terminate the agreement. The airline argued that the contract conferred upon it the right to determine, in its sole discretion, the level of promotion for the joint venture. It also argued that its decision to reduce the level of promotion as a cost cutting measure was a legitimate business objection. The Court disagreed holding that the airline had breached its duty of good faith by failing to take steps reasonably calculated to attract the target number of customers. The Court further found that the airlines' promotional efforts were not conducted in good faith, but were in fact motivated by a desire to eliminate the joint venture.

Appendix C

Travellers is distinguishable from the matter under consideration here. In *Travellers*, the agreement explicitly required the airlines to undertake certain promotional efforts on behalf of the joint venture. There was a direct correlation between the airlines' marketing efforts and the plaintiff's ability to perform its contractual obligation to attract a certain number of customers to sign up for the tour packages. In this case, by contrast, plaintiff's ability to perform its payment obligation was solely within its own power. Plaintiff has made no showing that Hanes discouraged it to make its payment, refused to accept payment, or in any way indicated that the payment obligation was suspended. Moreover, "[t]he law is clear that even if [the franchisee] had established breaches by [the franchisor] . . . those breaches would not relieve [the franchisee] of its obligation to pay franchise fees." *Romacorp., Inc. v. TR Acquisition Corp.*, 1993 WL 497969 (S.D.N.Y.), *aff'd*, 29 F.3d 620 (1994); *McDonald's Corp. v. Robert A. Makin, Inc.*, 653 F. Supp. 401, 403 (W.D.N.Y. 1986) (holding that "the alleged wrongs of [the terminating party] do not constitute affirmative defenses to defendant's non-payment of franchise fees."); *see also, Sunbeam Corp. v. Morris Distributors Co., Inc.*, 55 A.D. 2d 722, 389 N.Y.S. 2d 173 (3d Dept. 1976) *appeal denied*, 41 N.Y.2d 802, 362 N.E.2d 626 (N.Y. 1977) (holding that a buyer's claim that the seller breached an agreement unrelated to the goods shipped and delivered in not a defense to a suit for the price); *Petroleo Brasiliero, S.A. v. Ameriopan Oil Corp.*, 372 F. Supp. 503, 505 (E.D.N.Y. 1972).

In sum, plaintiff's theory that Hanes is precluded from relying on its non-payment as a basis for termination because it was provoked by Hanes' bad faith pre-termination conduct, is without merit.

Appendix C

B. *There is No Evidence that Plaintiff's Breach was Provoked*

Plaintiff's evidentiary support for its claim includes the affidavits of its President, Thomas Hoar, Jr., and its Chairman, Thomas Hoar Sr. They are the principals who decided to withhold the invoice payments. Only Mr. Hoar Jr.'s affidavit addresses, albeit indirectly, the provocation claim. After describing how his company had been allegedly harassed, scrutinized, its customer's solicited and converted, and subject to a pretext audit, he explained that he and his father believed that they had no choice but to bring suit. Hoar Jr. Aff. ¶ 20. However, instead of showing how Hanes' conduct actually provoked its failure to make payment, plaintiff treats the decision to bring the lawsuit and the decision to withhold payments as one and the same. Yet, the events that led to plaintiff's decision to bring suit took place prior to the invoices becoming overdue. Plaintiff provides no explanation as to how its subsequent refusal to pay for the merchandise, some of which was ordered several weeks after the last alleged acts of provocation by Hanes, was caused or provoked by Hanes. Indeed, if plaintiff wanted to continue its distributorship, one would expect that it would have been careful to comply with it payment obligations. This is especially true where the Hoars' testimony confirms that they knew that a refusal to pay could lead to their termination. Hoar, Jr. Dep. at 384 (Carpenter Decl., at Ex. 9); Hoar Sr. dep. at 487 (Carpenter Decl., Ex. 10).

Plaintiff now argues that it decision not to pay was based on its belief that Hanes had declared "all-out war" (Hoar. Jr. Aff. ¶¶ 19-20) and that even if they paid, they would be terminated anyway. However, no where in its opposition papers does plaintiff address the issue of how its decision not to pay is chargeable to Hanes rather than the result of its own choice. In fact, the record indicates the opposite.

First, plaintiff readily admits that on May 22, 1986, the date it filed this lawsuit, it made a tactical decision, on advice of counsel, to withhold payments admittedly owed. Hoar, Jr., Aff. ¶ 21 (Pl. Affs. Opp'n. and Responsive Rule 3(g) Statement). Plaintiff maintained its position despite Hanes' subsequent payment demands. Thus, when asked about the overdue payment by Hanes' credit manager after suit was filed, plaintiff refused to speak with him and referred the matter to its attorney instead of sending the payment forthwith. Although the notice of termination, which Hanes issued shortly thereafter, was not effective for sixty days, plaintiff made no attempt to pay its debt until it was ordered to do so by Judge Platt.

Second, earlier in the litigation, plaintiff gave specific reasons for its decision not to pay. Initially, plaintiff argued that its refusal to pay was based on an unspecified pending dispute with Hanes about the money owed. Dep. Exh. 19 (Carpenter Decl., Ex. 12). However, on deposition Thomas Hoar Jr. could identify only two outstanding disputes, totalling only $54,000, neither of which related to the $500,000 of unpaid invoices. Hoar, Jr. Dep. at 265-266, 284-287 (Carpenter Decl., Ex. 8). Subsequently, in opposing Hanes' motion for summary judgment on its non-payment counterclaim, plaintiff argued that the Agreement was void and unenforceable under anti-trust laws. These justifications are noteworthy for the absence of any suggestion that plaintiff's decision to withhold payments was provoked or caused by Hanes.

In this case, to find that Hanes intended to provoke plaintiff's non-payment, this court would have to infer that Hanes could have foreseen that plaintiff would: 1) fail to comply with the audit despite its contractual obligation to do so; 2) bring a massive antitrust and RICO suit against it about a

week before the last extension for complying with the audit; 3) order merchandise before filing the lawsuit and subsequently refuse to comply with its contractual payment obligations. These inferences are too implausible to be seriously entertained. In fact, except as part of a litigation strategy, plaintiff's non-payment was an inexplicable act for a company that claims it wished to continue its business relationship.

Although it is certainly plausible that plaintiff would not have withheld payment but for the lawsuit, plaintiff has failed to offer any evidence from which this court can infer that Hanes intended to provoke it into refusing to pay for merchandise that it ordered, accepted, and kept in the ordinary course of business. Moreover, there is no evidence that plaintiff's decision to breach its contractual obligation was instigated by any outside party other than its own counsel. That plaintiff's litigation strategy proved ineffective does not thereby transform plaintiff from a responsible actor into a hapless victim caught in the web of Hanes' plot to pressure it into breach. Therefore, this court finds that plaintiff has failed to establish any evidence or reasonable set of inferences to support its provocation claim. Accordingly, plaintiff's provocation claim does not bar granting Hanes' motion for partial summary judgment.

V. Breach of Fiduciary Duty

Plaintiff next argues that its termination was unlawful because it was obtained through Hanes' breach of a fiduciary duty owed to plaintiff. As noted earlier, the applicable law on this contract related question is North Carolina law.

In *Tin Originals Inc., v. Colonial Works, Inc.*, the Court of Appeals of North Carolina held that no fiduciary relationship

existed between an exclusive distributor and its manufacturer. 391 S.E.2d 831 (N.C. Ct. App. 1980). In that case, the plaintiff argued that a fiduciary relationship existed because the evidence showed that it placed a special trust and confidence in the defendants. Specifically, the plaintiff pointed to the fact that defendants were its only source of decorative tin items which constituted 80% of its sales. Similarly, in this case, plaintiff relied on Hanes' to supply 90% of the goods it sold.

Plaintiff argues that *Tin Originals* is not controlling here because the Court's holding was expressly limited to the specific facts and circumstances of that case. Plaintiff further argues that the Court's refusal to find a fiduciary relationship in that case was based on its apparent acceptance of the defendant-manufacturer's contention that the parties were in equal bargaining positions, unlike the parties here. This court disagrees. In *Tin Originals*, the Court made clear that its holding was based upon the fact that it could find no reported North Carolina cases which extended the concept of fiduciary relationship to mutually interdependent businesses. 391 S.E.2d at 833. In making this finding, the Court refused to adopt the plaintiff's argument that a prior North Carolina case, *General Tire and Rubber Co. v. Distributors Inc.*, 253 N.C. 271, 382 S.E.2d 439 (1960), had recognized a fiduciary relationship between a distributor who had expended substantial sums in establishing and promoting the distributorship. *Id.* at 833. ("Nowhere in General Tire does the court state that a fiduciary relationship exits between a distributor and manufacturer. We are unwilling to engraft on General Tire an implicit holding that there was a fiduciary relationship in that case.").

Nothing in North Carolina law leads this court to believe that the courts of that state would recognize a fiduciary relationship in this case. Accordingly, this claim does not preclude granting Hanes' motion for partial summary judgment.

Appendix C

Tortious Interference

Finally, plaintiff argues that its termination was unlawful because it was accomplished by an act of tortious interference with prospective economic advantage.

The parties have agreed that the law applicable to this tort law claim is the law of New York. *See Don King Productions, Inc. v. Douglas*, 742 F. Supp. 741, 771 n.30 (S.D.N.Y. 1990). Under New York law, a claim for tortious interference with prospective economic advantage requires proof that the defendant interfered with business or economic relations between plaintiff and a third party, either with the sole purpose of harming the plaintiff or by dishonest, unfair, or improper means. *PPX Enterprises, Inc. v. Audiofidelity Enters, Inc.*, 818 F.2d 266, 269 (2d Cir. 1987); *Barr Labs., Inc. v. Quantum Pharmica, Inc.*, 826 F. Supp. 111, 118 (E.D.N.Y. 1993); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y. 2d 183, 190-191, 196, 428 N.Y.S. 2d 628, 406 N.E.2d 445 (1980).

Hanes concedes for the purposes of this motion that its conduct prior to the termination and its decision to exercise its contractual right to terminate for breach was motivated, at least in part, by its desire to have plaintiff's clients buy directly from Hanes. See Def. Mem. at 8. Under New York law, if the defendant's interference was motivated, at least in part, by its own commercial interest, the claim will fail unless the means employed include criminal or fraudulent conduct. *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 838 (2d Cir. 1980); *PPX Enterprises, Inc.*, 818 F.2d at 269. The interference at issue was caused by none of these means, but by a termination on a ground specifically authorized by the contract. The express contractual authorization also precludes

any showing that in terminating plantiff's distributorship, Hanes' acted solely with malice since the termination was legally justified. Similarly, plaintiff has no viable claim for unfair competition since New York requires a showing of bad faith. *See Saratoga Vichy Springs Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980); *Robert J. McRell Assoc. v. Insurance Co. of N. Am.*, 677 F. Supp. 721, 729 (S.D.N.Y. 1987); *Refinement International Company v. Eastbourne N.V.*, 815 F. Supp. at 742 (holding that motive is legally irrelevant to the validity of a termination where the basis for the termination constituted valid grounds under the contract). Accordingly, plaintiff's claim does not bar granting Hanes' motion for partial summary judgment.

VII. Defendant's Alleged Pre-Termination Breaches are Otherwise Irrelevant

Plaintiff's claim that it established Hanes' breaches of fiduciary duty and tortious interference independently of termination is irrelevant to the issue presented on this motion. To the extent that alleged efforts to solicit and convert plaintiff's major clients led to the loss of plaintiff's client Robbins, plaintiff has a separate claim for damages based on that conduct which is unaffected by the present motion. Plaintiff has not otherwise claimed damages from the alleged pre-termination conduct.

VIII. Post-Oral Argument Submission

By letter dated April 8, 1996, plaintiff submitted a post-oral argument summary of its case in opposition to this motion. The letter also introduced new evidence concerning Hanes' relative leniency towards other distributors and direct accounts

with respect to enforcing deadlines for invoice payments. In particular, plaintiff relies on the supplementary affidavit of a former Hanes credit manager and an unsworn letter from plaintiff's former attorney's law partner. *See* Letter of Robert D. Owen, dated April 8, 1996. Ex. 2; Ex. 4.

Under Rule 6(d) of the Federal Rules of Civil Procedure affidavits in opposition to a motion for summary judgment must be served at least one day before the hearing on the motion. While a court may allow service at a later time, it may not do so after the prescribed deadline except "upon motion" and upon a showing that "the failure to act was the result of excusable neglect." Fed. R. Civ. P. 6(b). In *Lujan v. National Wildlife Federation*, the Supreme Court made clear that before a court may accept an untimely affidavit after its due date, both the motion and a showing of excusable neglect are required. 497 U.S. 871, 895-96 (1990). In this case, plaintiff has made no such showing. While this court may therefore decline to consider plaintiff's new evidence, the court has considered the submission and finds the new evidence inapposite to Hanes' lawful termination of plaintiff for breach of contract.

According to the supplementary affidavit of the former Hanes credit manager, it was atypical for Hanes to terminate a distributor for late invoice payments. *Id.* at Ex. 2. Plaintiff offers this evidence in support of its claim that Hanes had to "change the rules" in order to terminate Hoar. *Id.* at 3. However, Hanes' general treatment of other distributors in the ordinary course of business is a substantially different matter from Hanes' decision to exercise its contractual right to terminate for non-payment after plaintiff brought a massive anti-trust suit and subsequently referred Hanes' overdue payment inquiries to its attorney. Further, under the express terms of the Agreement,

"[t]he failure or forbearance of either party to enforce its rights with respect to any breach of this Agreement by the other party shall not constitute a waiver of or limitation upon its rights with respect to any continued or subsequent breach of this Agreement." Franchise Agreement ¶ 19 (Carpenter Decl., Ex. 2).

The unsworn letter from Mr. Jaffe is without probative value since Mr. Jaffe admits therein that he does not recall having a conversation with Hanes' credit manager concerning the overdue payments and that he had not reviewed relevant files. *Id.* at Ex. 4. While Mr. Jaffe states that he knows that in any event he "would not have said that Hoar had no intention of paying the bill," this unsworn statement does not meet the requirements of Rule 56(e). *Id; see* Fed. R. Civ. P. 56(e); *Adickes v. S.H. Kress & Co.* 398 U.S. at 158 n.17; *Dukes v. City of New York*, 879 F. Supp. 335, 343 (S.D.N.Y. 1995). Moreover, the statement does not contradict plaintiff's admission that Mr. Jaffe, in response to overdue payment inquiries, told Mr. Peoples that Hanes' recourse for non-payment would be to file a counterclaim in the pending litigation. Peoples Aff., ¶ 6 (Carpenter Decl., Ex. 4). Nor does it alter the fact that plaintiff did not submit the overdue payments until ordered to do so, some fifteen (15) months later, by Judge Platt. Therefore, plaintiff's post oral argument submission does not preclude granting this motion for partial summary judgment.

CONCLUSION

For the reasons stated above, this court holds that defendants had good cause to terminate plaintiff upon its breach of the Agreement. Therefore, this court finds that the

termination was valid and effective. In addition, defendants' reasons for exercising that termination right are irrelevant to the validity of the termination. None of plaintiff's claims for liability based on an unlawful or invalid termination have any merit.

Accordingly, defendants' motion for partial summary judgment is granted and all of the plaintiff's claims are dismissed except for its claims against defendants concerning the conversion of the Robbins account.

SO ORDERED.

s/ John L. Caden
JOHN L. CADEN
United States Magistrate Judge
Eastern District of New York

Dated: May 8th 1996
Brooklyn, New York

APPENDIX D — ORDER AND JUDGMENT DATED MAY 13, 1992 AND PARTIAL JUDGMENT DATED MARCH 31, 1992 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civ. No 86-1738
(T.C.P.)

THOMAS E. HOAR, INC.,

Plaintiff,

v.

SARA LEE CORPORATION, *et al.*,

Defendants.

ORDER AND JUDGMENT ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT II OF THEIR COUNTERCLAIM

At hearing on February 28, 1992, the Court granted Defendants' motion for partial summary judgment on Count II of the Counterclaim. The motion seeks to recover the amount of promotional allowances given to Plaintiff Thomas E. Hoar, Inc., as damages for breach of contract, breach of trust, and unjust enrichment, based on Plaintiff's failure to comply with conditions on which the allowances were given. On undisputed facts, the allowances were given on condition that they be passed through to Plaintiff's retailer customers, and that they be returned by a billback procedure if they were not passed

through to customers and not claimed by Plaintiff in compliance with the promotional allowance requirements.

By Memorandum and Order of March 31, 1989, the Court held that the promotional allowance pass-through requirement is lawful and enforceable. At the February 28, 1992 hearing, the Court ruled that the Court's discovery sanction order of August 29, 1989 precludes Plaintiff from introducing any evidence of compliance with the pass-through requirement and that Defendants are entitled as a matter of law to recover the undisputed amount of the allowances given to Plaintiff subject to that requirement and not heretofore returned.

It being expressly determined that there is no just reason for delay and expressly directed that final judgment be entered on Count II of the Counterclaim, pursuant to Fed. R. Civ. P. 54(b), it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. That Defendants' motion for partial summary judgment is granted;

2. That the Clerk of this Court is directed to enter final judgment that Defendants shall recover of Plaintiff the sum of $788,864.50, plus interest;

3. That costs will be taxed only upon entry of judgment upon the Complaint.

Dated: Uniondale, New York, March 13, 1992.

s/ Thomas C. Platt
Thomas C. Platt
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civ. No. 86-1738
(TCP)

THOMAS E. HOAR, INC.,

Plaintiff,

-against-

SARA LEE CORPORATION, et al.,

Defendant.

PARTIAL JUDGMENT

As order having been entered herein on March 13, 1992 that partial summary judgment be entered in favor of defendants upon Count II of its Counterclaim awarding to defendants the sum of $788,864.50, plus interest, and the Court having certified therein that there was no reason for delay, and expressly directed the entry of final judgment, and the Court having directed that the Clerk of this Court enter final judgment that defendants shall recover from plaintiff the said sum of $788,864.50, plus interest and that costs be taxed only upon entry of a judgment upon the complaint, it is hereby

ORDERED, ADJUDGED AND DECREED, that defendants recover of plaintiff the principal sum of $788,864.50, plus interest at the rate of 6% for the period from December 31, 1980 through June 22, 1981 and at the rate of 9% for the

period June 23, 1981 through March 26, 1992 in the amount of $566,510.01 for a total of $1,355,374.31.

Dated: Uniondale, New York
March 31, 1992

s/ ROBERT C. HEINEMANN
Clerk

By: s/ Joseph Di Tulia
Deputy Clerk-in-Charge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 20, 1998

UNITED STATED COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of October, one thousand nine hundred and ninety-eight.

Docket No: 97-9056

THOMAS R. HOAR, INC.,

Plaintiff-Appellant,

-V-

SARA LEE CORPORATION and SARA LEE KNITWEAR, INCORPORATED,

Defendants-Appellees.

The petition for rehearing is denied. Although Hoar is technically correct that it did raise in the court below the contention that preclusion was inappropriate because the fault lay with its attorney rather than itself, it was not raised in timely fashion. This contention was first raised in a motion to vacate judgment, seven years after entry of the order of preclusion. In any event, Hoar's failure to raise this issue properly below was

but an alternative ground for our holding. We also concluded that the court "acted within its discretion in imposing the sanction of preclusion and granting summary judgment."

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk

By: s/ Lucille Carr
Lucille M. Carr
Deputy Clerk